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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MEHMET SEMIH SIDALI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals opinion should be vacated when the case becomes moot by happenstance prior to issuance of the mandate and expiration of the time for seeking certiorari from this Court.

PARTIES TO THE PROCEEDINGS

Petitioner is Mehmet Semih Sidali who was the plaintiff and petitioner in the district court and the appellee in the court of appeals.

Respondents are the Immigration & Naturalization Service ("INS"), the United States of America, Warren Christopher, Secretary of State and Charles McNeal, Acting United States Marshal for the District of New Jersey. All respondents appear in their official capacities and were appellants in the court of appeals. In the district court the Acting United States Marshal was a respondent and all others were defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on May 28, 1997.

OPINIONS BELOW

The opinion of the magistrate judge certifying Mr. Sidali's extraditability (App., *infra*, 23a—43a) is reported at 899 F.Supp. 1342. The decision of the district court granting habeas corpus and overturning the certification of extraditability (App., *infra*, 44a—66a) is reported at 910 F.Supp. 1104. The

decision of the court of appeals reversing the district court and denying habeas corpus (App., *infra*, 3a—22a) is reported at 107 F.3d 191. The order of the court of appeals denying rehearing and the suggestion of rehearing *en banc* with respect to the reversal of habeas corpus (App., *infra*, 67a) is unpublished. The order of the court of appeals denying Mr. Sidali's motion to dismiss the appeal and vacate the panel's opinion (App., *infra*, 1a) is unpublished. The order of the court of appeals denying rehearing and the suggestion of rehearing *en banc* with respect to the dismissal motion (App., *infra*, 2a) is unpublished.

JURISDICTION

The order of the court of appeals denying the motion to dismiss and vacate was entered on May 28, 1997 and a petition for rehearing was denied on July 24, 1997. (App., *infra*, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2106 provides that "The Supreme Court or any court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT

This case presents an express conflict among the circuits over application of the doctrine that vacatur should be granted when mootness occurs by happenstance, as a unanimous Court recently reiterated in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997). Following precedent in the Third Circuit, a divided panel below refused to vacate its previous opinion even though the case had became moot prior to expiration of the time for seeking review from this Court. *Compare In re Ghandtchi*, 705 F.2d 1315 (11th Cir. 1983) (vacatur required when case becomes moot after panel

opinion but before time for seeking certiorari) and *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 966 F.2d 457 (9th Cir. 1992) (same) *with Humphreys v. Drug Enforcement Administration*, 105 F.3d 112 (3d Cir. 1996) (vacatur not required when case becomes moot after decision by panel). Even though Mr. Sidali cannot obtain further review of the opinion below, this decision has already been invoked to impose the most serious legal consequences upon him contrary to the principles underlying the doctrine of vacatur. *See United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950) (vacatur utilized to prevent a judgment "unreviewable because of mootness, from spawning any legal consequences").

The underlying controversy in this case involved Turkey's now abandoned effort to extradite Mr. Sidali for a crime that occurred a quarter of a century ago and for which he was twice acquitted by two separate Turkish trial courts who actually heard the evidence against him.[1] (App., *infra*, 51a—52a). Indeed, this case represents the first instance in American legal history when the government has sought to extradite someone in the face of two prior acquittals by trial courts. While the case against Mr. Sidali in Turkey has now been dropped, the extradition request withdrawn, and the extradition complaint dismissed (App., *infra*, 68a), the decision by the court of appeals has nevertheless been given preclusive effect to deny Mr. Sidali naturalization. (App., *infra*, 122a).

The events involved in the extradition request reach back to the morning of April 18, 1970 when Dursun Eskin, a fifteen year old girl who had been living with the Sidali family in Mersin, Turkey was found dead in her bedroom. (App., *infra*, 49a—50a). Still dressed in her daytime clothes, including a

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[1] In what was the first extradition request under the present treaty, Turkey sought Mr. Sidali's surrender for the crime of murder to conceal evidence under Article 450 (9) of the Turkish Penal Code ("TPC") (App., *infra*, 102a—106a) which carried a mandatory death sentence. *See* Treaty on Extradition and Mutual Assistance in Criminal Matters Between the United States and Turkey, T.I.A.S. 9891 ("Treaty").

sweater, blouse, bra and black pants, she was the apparent victim of strangulation following sexual intercourse, with the killer having arranged her long hair in a design on a her face and stuffed cotton in her nose. (App., *infra*, 125a—128a). There were no witnesses to this crime, and no forensic evidence recovered from the crime scene, such as blood or semen samples, ever linked Mr. Sidali with this crime, as the government has conceded. (App., *infra*, 49a—50a). A devoted father and husband, Mr. Sidali, who has been happily married for 31 years, was never shown to have had any motive to commit such a senseless and perverse crime.(App., *infra*, 133a—142a).[2]

With respect to the facts of the crime, Mr. Sidali was not at home at the time the victim was last seen or heard alive during the evening, when the loud and continuous barking of the family dog raised concern.[3] (App., *infra*, 49a—50a, 131a). Moreover, the victim was not seen again until the next morning, when she was found dead. (App., *infra*, 49a—51a). Second, the "autopsy" of the victim, performed by the medical examiner in a cemetery with the assistance of a preacher did not fix the time of death and simply noted that the corpse was "dead solid."[4] (App., *infra*, 49a—51a, 127a—128a). Third, the exterior gate to the Sidali family home, located on a large lot, had a latch but no lock, and when Mr. Sidali did return home around 9:00 p.m. on April 17, 1970 he noticed that this gate was halfway open. (App., *infra*, 132a—134a). Fourth, the

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[2] In that connection, the magistrate judge presciently noted that "[f]uture reviewers of this record may be unable to assess the true depth of genuine desolation exhibited by Mr. Sidali and his family" during their appearances before the Court. (App., *infra*, 41a).

[3] As the Mersin High Criminal Court noted in acquitting Mr. Sidali a second time, "As it is impossible for the dog to bark at the accused, the first conclusion to be drawn out is that someone, that is to say a stranger, has entered the garden thus the house that night." (App., *infra*, 131a).

[4] This supposed autopsy does not reflect any of the standard tests for determining time of death. *See, e.g.*, 1C *Attorney's Textbook of Medicine* §29.50 *et seq.* (1993).

government never provided any explanation for the surprising change of position by Expert Police Officer Bilgin who in a report composed on April 19, 1970 found evidence of an attempted break-in including "points where force was applied" around the door to the house" but altered these findings in a report on April 21, 1970, after Mr. Sidali had been charged, stating there was "no trace" of an attempted break. (App., *infra*, 64a). Fifth, the moment Mr. Sidali was first questioned by the authorities he invited the prosecution's doctor to examine him[5] and has maintained his innocence throughout these proceedings. (App., *infra*, 134a—137a). Sixth, a few days before April 17, 1970 Mr. Sidali's three year old son Mustafa fell and hit his forehead while visiting a neighbor's house with his mother. (App., *infra* 133a, 137a—139a). Mrs. Sidali bandaged the wound with a piece of gauze, which she then discarded the next day in her bedroom.(App., *infra*, 137a—139a). In getting up with her husband on the morning of April 17, 1970, Mrs. Sidali noticed a small blood stain on her husband's pajamas "the size of a lentil," showed him a nearly identical stain on the bed sheet and told him he must have crushed a large mosquito, which are plentiful in Mersin's hot climate. (App., *infra*, 137a—139a). No forensic testing ever linked the blood on the gauze or the pajama to the victim.(App., *infra*, 64a).

As for the Turkish proceedings, two separate decisions by Turkish magistrates ordered Mr. Sidali's release for lack of probable cause. (App., *infra*, 27a). Furthermore, the two different trial panels of the Mersin High Criminal Court that acquitted Mr. Sidali in two separate trials heard not only his own evidence but also visited the crime scene. (App., *infra*, 51a—53a).[6] Following Mr. Sidali's second acquittal in July

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[5] This examination found nothing to connect Mr. Sidali with the crime. ("No trace of scratch was observed in [Sidali's] hands, neck, face, and body, as well as in the area surrounding the 'penis that would suggest having been caused by a struggle or fight."). (App., *infra*, 51a, 124a).

[6] The first three judge panel acquitted Mr. Sidali by a vote of 2 to 1; the second three judge panel, which consisted of the presiding judge from the

(Footnote continued)

1976, the prosecution appealed to the General Board of the Turkish Court of Appeals, which entered a judgment on December 13, 1976 that annulled the second acquittal. (App., *infra*, 51a—53a).

At that time Mr. Sidali was living in Ankara and, with no knowledge of the General Board's decision, he applied for a passport on December 17, 1976. (App., *infra*, 53a). While initially detained by Turkish authorities, he was later cleared to depart in the absence of any record that he had been convicted of a crime. (App., *infra* 53a). Since coming to this country Mr. Sidali has lived openly in the United States eventually becoming a lawful permanent resident as well as a respected member of the community in Trenton, New Jersey. (App., *infra*, 42a—43a, 53a). While Turkey apparently first requested his extradition in February 1982, these proceedings were not instituted until October 1994. (App., *infra*, 53a, 64a—65a). Though the government attempted to ascribe this 12 year delay to the need for accurate translations (App., *infra*, 146a),[7] the record is clear that the attempt to extradite Mr. Sidali went forward only after Turkey extradited a narcotics trafficker named Erdogan Kurap back to the United States. (App., *infra*, 47a, 64a—65a).

Extradition proceedings were instituted in the District of New Jersey on October 31, 1994 with the filing of a complaint alleging that Mr. Sidali had been convicted in Turkey. (App., *infra*, 28a).[8] The magistrate judge assigned to the case

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first panel and two new judges, acquitted him unanimously. (App., *infra*, 6a—7a).

[7] Similarly, the government admitted to the magistrate judge that in reviewing foreign extradition requests nothing goes on "besides some bureaucratic checking of documents" and found nothing unfair in the fact that extradition was sought for "someone [who] has been acquitted twice at trials, has lived openly and apparently with an unblemished record in this country for. . . almost 20 years."(App., *infra*, 47a-48a) .

[8] Under 18 U.S.C. §3184 a magistrate judge may conduct extradition proceedings if authorized by the District Court and Local Rule 40 (B) (12) of the District of New Jersey provided such authorization.

conducted an evidentiary hearing under 18 U.S.C. § 3184 at which both Mr. Sidali and his wife testified. (App., *infra*, 29a—30a).[9] After the hearing, the magistrate judge certified Mr. Sidali as extraditable based on the legal conclusion that he had been convicted by a Turkish appellate court and, in the alternative, made four factual findings to establish probable cause: (1)Mr. Sidali had the opportunity to commit the crime, (2) Mr. Sidali was the only man living in the house at the time of the crime, (3)there was "inconclusive proof" to demonstrate that another man entered the house at the time of the crime, 4)Blood was discovered on Mr. Sidali's pajama sleeve. (App., *infra*, 40a). At the same time, the magistrate judge expressed his concern, (App., *infra*, 41a—42a) about the propriety of extraditing Mr. Sidali and requested the Secretary of State to make a further inquiry into the matter given the peculiar nature of the case.[10]

Upon habeas corpus review[11], the district court concluded that the government had not met its burden in demonstrating Mr. Sidali's conviction. [12] (App., *infra*, 57a—61a). Indeed, on

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[9] A complex procedural history including protracted litigation over bail preceded this hearing and Mr. Sidali was held in custody throughout proceedings before the magistrate judge. (App., *infra*, 28a).

[10] As the District Court observed, "one cannot read the record of proceedings before the Magistrate Judge and come away with any conclusion other than that he expected that the Secretary of State's review would result in the denial of extradition." (App., *infra*, 47a).

[11] Mr. Sidali had initially commenced an action in district court to compel adjudication of his pending application for naturalization, which was a defense to extradition under Article 4 of the Treaty. Upon issuance of a warrant for his extradition by the Secretary of State he amended his complaint to seek habeas review of his extraditability. (App., *infra*, 55a) Since extradition proceedings do not represent the exercise of Article III judicial power, there is no direct appeal and review must be sought by habeas corpus. *See, e.g., Matter of Mackin*, 668 F.2d 122 (2d Cir. 1981).

[12] In this connection, the district court found the Turkish extradition documents to be contradictory and confusing at best, with many documents flatly inconsistent with the existence of a conviction. (App., *infra*, 56a—61a).

this issue the government even conceded before the District Court that "We'll never know until he gets back to Turkey what the right answer [is]. . . It could come out either way. . . ." (App., *infra*, 61a). As to the issue of probable cause the district court held that the magistrate judge's findings did not establish probable cause, especially since there was no evidence fixing the victim's death at any time when Mr. Sidali was present.: "[T]here is no evidence that [Mr. Sidali] was even present when the rape and murder occurred and *a fortiori* no evidence that he had the opportunity to commit the crime." (App., *infra*, 64a) [13]

The government then appealed to the Court of Appeals for the Third Circuit raising for review only the two issues decided by the District Court. (App., *infra*, 3a—20a). In a decision dated February 24, 1997, a Third Circuit panel held that Mr. Sidali had been convicted by a Turkish appellate tribunal following his second acquittal. (App., *infra*, 13a—18a). Going beyond the findings made by the magistrate judge, the panel reviewed the record, made its own findings and concluded that probable cause had been established while acknowledging that the evidence against Mr. Sidali was "less than overwhelming" and the Turkish investigation was imperfect. (App., *infra*, 18a—21a). *Compare Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992) (reviewing court should not make "its own factual findings"); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1212 (7th Cir. 1996) (appellate courts may not "dabble in fact-finding"). Moreover, deciding an issue that had not been raised by either side on appeal or reached by the District Court, the panel held that there were

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[13] The district court noted, but did not reach Mr. Sidali's claim that the magistrate judge's denial of his request for discovery of the forensic evidence for DNA testing to rebut probable cause was an abuse of discretion and a denial of due process. (App., *infra*, 64a—65a). *See, e.g, Quinn v. Robinson*, 783 F.2d 776, 817n. 41 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) (denial of discovery in extradition proceeding may violate due process); *Sindona v. Grant*, 450 F.Supp. 672, 685 (S.D.N.Y. 1978) (person whose extradition is sought has the right to present "reasonably clear cut proof" that would negate finding of probable cause.

no legal constraints on the power of the executive to extradite someone to face procedures contrary to fundamental notions of decency and due process. (App., *infra*, 11a) [14] Finally, the panel directed that Mr. Sidali's petition for habeas corpus be dismissed on remand, even though Mr. Sidali had raised several other defenses to extradition that the district court took care to note were not reached in her decision and thus not before the court of appeals. (App., *infra*, 21a, 56a, 147a). *Compare Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (appellate court should not consider issue not passed on below and not raised by the parties on appeal); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (same); *International Union v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986) (*Singleton* and *Hormel* applied to remand issues for consideration by District Court).

In accordance with Rule 41 of the Federal Rules of Appellate Procedure, Mr. Sidali petitioned for rehearing and sought rehearing *en banc* with respect to this decision, which stayed issuance of the mandate. [15] (App., *infra*, 67a). While the

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[14] In holding that executive discretion in this area was completely unfettered, the court of appeals reached a controversial issue that was not presented for review on full briefing and rendered a conclusion uninformed by the sound skepticism that historical experience should prescribe before ceding all decisions about human liberty to executive competence. *See, e.g., United States v. Lui Kin-Hong*, 110 F.3d 103, 112 (1st Cir. 1997) (rule of "non-inquiry" not absolute and court, quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), can envision judicial intervention when person extradited "would be subject to procedures or punishment so antipathetic to a federal court's sense of decency"); *In re Normano*, 7 F. Supp. 239 (D. Mass. 1934) (Secretary of State declines to exercise discretion not to extradite Jewish suspect to Third Reich). *Compare Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990) (apparently abandoning *Gallina* dictum) *with Saleh v. United States Department of Justice*, 962 F.2d 2234, 241 (2d Cir. 1992) (citing *Gallina* with approval, at least in the immigration context).

[15] Since the panel's opinion holding that Mr. Sidali had been convicted by the General Board after his second acquittal relied heavily upon Article 326 of the Turkish Code of Criminal Procedure that trial courts must "abide" by the General Board's decision, Mr. Sidali's rehearing petition provided an expert opinion, Turkish legal materials, and decisions of the General Board itself establishing that "abiding" by the General Board's

(Footnote continued)

rehearing petition was pending, Mr. Sidali received the decision of the Mersin High Criminal Court dismissing the criminal charges against him under the relevant Turkish statute of limitations. (App., *infra*, 88a—90a). Moreover, the circumstances surrounding this dismissal further confirmed that Mr. Sidali was never convicted in Turkey.

In reviewing the history of the case, the Mersin trial court noted that the General Board's decision from December 1976 merely reversed the second acquittal and says nothing about a conviction being entered by that appellate tribunal. (App., *infra*, 88a—90a). Furthermore, under what the Mersin court held was the applicable Turkish statute of limitations of 20 years, prosecution of Mr. Sidali became untimely on March 29, 1997, 20 years after the issuance of the warrant for his arrest. In that connection, Article 102(1) of the TPC sets 20 years as the limitations period on a capital offense, Article 103 provides that the time begins to run from the date of the crime, and Article 104 provides that the statute begins to run anew from certain specified events. While the Mersin court held that the 20 year limitations period began to run anew on March 29, 1977 and ran out on March 29, 1997, the decision also recognized that a new event could have caused the statute to run again, and under Article 104 the only such event would have been a conviction. (App., *infra*, 88a—90a) Indeed, in May 1993 the decedent's attorney, who was permitted to maintain a private damage action as part of the criminal proceedings, had even urged the Mersin court to *convict* Mr. Sidali in order to start the statute of limitations running anew, otherwise the case would be time barred on March 29, 1997. (App., *infra*, 99a—101a). Similarly, this submission, in reciting the history of the case, notes only that the General Board reversed the second acquittal and says nothing about a conviction having been imposed by the appellate tribunal. At the same time, this pleading by the decedent's attorney urges

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decision prevents a trial court from insisting upon a prior acquittal but does not preclude the court from holding a new trial and acquitting the defendant after that new trial. (App., *infra*, 114a—121a).

that the limitations period will run anew "If [Mr. Sidali] is convicted." (App., *infra*, 99a—101a).

Given the Turkish trial court's dismissal of the charges against him, Mr. Sidali moved to dismiss the government's appeal in his case as moot and sought vacatur of the panel's opinion. By a diplomatic note received on May 7, 1997 the Turkish authorities withdrew the request for Mr. Sidali's extradition noting that the Mersin trial court had decided "to abolish the case against [Mr. Sidali] because the statute of limitations has expired." (App., *infra*, 73a—74a). Moreover, on May 9, 1997, the magistrate judge before whom extradition proceedings against Mr. Sidali had been commenced under 18 U.S.C. § 3184 issued a decision, on the government's motion, dismissing the extradition complaint, and on May 27, 1997 the district court entered an order discharging Mr. Sidali from bail. (App., *infra*, 68a, 69a).

Nevertheless, the government opposed Mr. Sidali's motion to dismiss the appeal as moot, and on May 28, 1997, with Judge Becker dissenting, the motion was denied. (App., *infra*, 1a). At the same time, the government urged that Mr. Sidali's pending petition for rehearing had become moot (App., *infra*, 80a), and on June 3, 1997 that petition was denied. (App., *infra*, 67a). Mr. Sidali then moved for a stay of the mandate to permit filing of a petition for rehearing with respect to the denial of his motion to dismiss for mootness and that motion was granted in an order entered June 17, 1997. (App., *infra*, 70a). On July 24, 1997, the Court of Appeals denied Mr. Sidali's petition for rehearing and suggestion of rehearing *en banc* with respect to mootness and vacatur.[16] (App., *infra*, 2a). Finally, on August 25, 1997, INS denied Mr. Sidali's pending application for naturalization (App., *infra*, 122a—123a) on the grounds that the panel's decision that he had been convicted in Turkey prevented him from showing good moral character necessary for naturalization. 8 U.S.C. § 1427 (a) (3).

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[16] Stay of the issuance of the mandate was continued, on Mr. Sidali's motion, to September 3, 1997. (App., *infra*, 70a—72a).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case to resolve an acknowledged conflict among the circuits on vacatur when a case becomes moot following decision by a court of appeals. *See, e.g., United States v. Lorenzenetti*, 467 U.S. 167 (1984) (certiorari granted to review Third Circuit precedent which refused to follow decisions from other circuits); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982) (same). As this Court recently summarized the established practice on vacating an opinion in *Arizonans for Official English*, 117 S.Ct. at 1071 "[v]acatur is in order when mootness occurs through happenstance" and should also be granted when the prevailing party renders the case moot. Similarly, a unanimous Court in *U.S.Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18, 25n. 3 (1994), while recognizing an exception to this established practice in cases of settlement, also took care to note, "We stand by *Munsingwear*'s dictum that mootness by happenstance provides sufficient reason to vacate.). *See also Anderson* v. *Green*, 513 U.S. 557, 560 (1995).

In line with established practice, the Eleventh Circuit in *In re Ghandtchi*, 705 F.2d 1315 (11th Cir. 1983) has held that vacatur should be granted when the case becomes moot before expiration of the time for seeking certiorari. As the Eleventh Circuit concluded, "We see no reason why this court should not declare the case moot when the mandate has not yet issued, if the Supreme Court can do the same while the case is pending before it on petition for certiorari, that is the Court has not yet taken jurisdiction." *See also National Solid Waste Management Association v. Alabama Department of Environmental Management*, 924 F. 2d 1001, 1002 n. 1(11th Cir. 1991) ("our obligation to review our jurisdiction is not relieved by the issuance of the original panel opinion because the mandate in this case has not yet issued."). Moreover, this also appears to be the position taken by both the District of Columbia Circuit and the Ninth Circuit. *See, e.g, Clarke v. United States*, 915 F.2d 699 (D.C.Cir. 1990) (*en banc*) (issuance of mandate delayed pending consideration of mootness *en banc* and vacatur granted after denial of rehearing);

Mahoney v. Babbitt, 113 F.3d 219 (D.C. Cir. 1997) (procedure in *Clarke* cited with approval though reasoning supporting vacatur questioned in dictum); *Independent Union of Flight Attendants v. Pan American World Airways*, 966 F. 2d 457, 459 (9th Cir. 1992) ("Because this appeal became moot while the petition for rehearing and suggestion for rehearing en banc were still pending and before the mandate issued, the appropriate disposition is to vacate the panel's opinion and dismiss the appeal.").

By contrast, Third Circuit precedent has expressly held that vacatur is not required when mootness occurs by happenstance after issuance of a panel decision. Thus *Humphreys v. Drug Enforcement Administration*, 105 F.3d 1112 (3d Cir. 1996) refused to vacate a panel opinion when the death of the prevailing party mooted the case and prevented the government from seeking further review. In reaching this result, the Third Circuit noted contrary cases "from sister circuits" and expressly refused to follow them. 105 F.3d at 117. In line with *Humphreys*, the Third Circuit panel below refused to dismiss the appeal and vacate its earlier opinion even though a clearer case of mootness by happenstance could hardly be imagined, with the passage of time eliminating the entire basis for seeking Mr. Sidali's extradition. Moreover, accepting at face value the government's claim below that the case did not become moot until the government dismissed the extradition complaint would seem to implicate the other basis for vacatur, namely action by the prevailing party to moot the case. *See Arizonans, supra*, mandating vacatur where the prevailing plaintiff's resignation from state employment had mooted her challenge to the state's English only requirement for public employees.

In any event, the Third Circuit's refusal, following *Humphreys*, to grant vacatur in Mr. Sidali's case underscores the conflict among the circuits on this issue. Indeed, the nature of this conflict is highlighted by comparison with the Eleventh Circuit's decision in *Ghandtchi*, itself an extradition case. In that case, the government had lost an appeal to the Eleventh Circuit involving district court review of the magistrate's

grant of bail to Mr. Ghandtchi pending completion of extradition proceedings. Prior to the issuance of the mandate, however, the magistrate completed those proceedings, found Mr. Ghandtchi extraditable, and ordered him remanded. Given these developments, the Eleventh Circuit granted a government motion to dismiss the appeal as moot and for vacatur. By contrast, in Mr. Sidali's case, Turkey has withdrawn the request for his extradition and the government has dismissed the extradition complaint, yet the Third Circuit has refused to vacate the opinion holding Mr. Sidali extraditable. In short, this case presents a classic conflict among the circuits warranting a grant of certiorari. *See, e.g., United States v. Lorenzenetti, supra*; *Insurance Corp. v. Compagnie Des Bauxites, supra.*

Apart from the conflict with other circuits, the Third Circuit's position runs counter to scholarly authority in this area. *See, e.g.,* 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 435 (1997) (". . . it is appropriate for a court of appeals to vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari."). Moreover, the seriousness and recurrent nature of this conflict is further underscored by the fact that the government's litigating position on this issue conflicts with Third Circuit precedent, as *Humphreys* itself makes clear. In other words, after due consideration, the government has concluded that mootness by happenstance mandates vacatur and has urged this position before the courts of appeal. Accordingly, the express conflict among the circuits on vacatur involves an issue of importance not only to Mr. Sidali but the government as well.

Furthermore, this direct conflict among the circuits presents a significant issue for the orderly administration of justice. In this regard, the Third Circuit's attempt to create an exception to the rule of vacatur in cases such as this, in direct conflict with other circuits, finds no support in the decisions of this Court and is not persuasive. Since the entire purpose of vacatur is to avoid penalizing a party who cannot obtain any further review of an adverse decision because of mootness,

vacatur should simply not hinge upon whether such review may be discretionary as the Third Circuit holds. Indeed, *Bonner*, *supra* suggests the inappropriateness of such a distinction by criticizing any attempt to make the availability of vacatur a function of the right to review or to rest vacatur upon an assessment of the merits of a moot case. Instead, as both *Bonner* and *Munsingwear* note, vacatur hinges upon considerations of orderly procedure and a party denied access to that procedure when mootness occurs by happenstance should not be forced to suffer adverse legal consequences from a judgment that cannot be reviewed.

Furthermore, any distinction based upon the availability of review would seem contrary to this Court's practice of granting vacatur when a case becomes moot while a petition for certiorari is pending, for no review on the merits could be had at that point. *See, e.g., Joint School District 24 v. Harris*, 115 S.Ct. 2604 (1995) (in school prayer at graduation case, graduation occurs during pendency of certiorari petition and opinion below vacated by this Court); *Alabama v. Davis*, 446 U.S. 903 (1980) (opinion below vacated when case becomes moot during pendency of certiorari petition). Similarly, the fact that the case was not moot when the appellate panel issued the decision but became moot later should not somehow limit the practice of vacatur, for the prior existence of court jurisdiction to rule on a matter is present whenever a decision is later vacated for mootness. *See, e.g., Arizonans*, *supra,* which vacates the district court opinion even though the plaintiff employee challenging the English only requirement had resigned her position and mooted the case after that decision was handed down.

Finally, there can be doubt that the panel's decision has spawned adverse legal consequences for Mr. Sidali. Indeed, INS has now held that the Third Circuit's opinion bars Mr. Sidali from naturalization, thus depriving him of a precious right. *See, e.g, Fedorenko v. United States*, 449 U.S. 490, 505 (1981) ("the right to acquire American citizenship is a precious one. . . ."). While the preclusive effect of the Third Circuit's denial of habeas corpus can certainly be questioned, this

has not prevented the INS from giving precisely such effect to this appellate opinion. Furthermore, however erroneous this administrative interpretation may be,[17] recent limitations on judicial review for aliens enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1672 and the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 100 Stat. 1214 (Apr. 24, 1996) may deprive Mr. Sidali of any judicial forum to challenge this administrative view before final imposition of devastating immigration consequences. *See, e.g., Costello v. INS*, 376 U.S. 120, 128 (1964) (recognizing the severity of adverse immigration consequences). In short, the devastating legal impact upon Mr. Sidali of a decision that he cannot challenge presents precisely the situation that vacatur was designed to prevent by clearing "the path for future relitigation." *Arizonans*, 117 S.Ct. at 1071 quoting from *Munsingwear*, 340 U.S. at 40.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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Mehmet Semih Sidali

September 3, 1997

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[17] *See, e.g., McClesky v. Zant*, 499 U.S. 467 (1991) (in general, no res judicata or collateral estoppel from denial of habeas corpus).

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 28, 1997

No. 96-5215

Re: SIDALI v. INS, et al.

Present: BECKER, MANSMANN, AND GREENBERG, *Circuit Judges.*

1. **Motion filed by Appellee, Mehmet Semih Sidali, to dismiss appeal as moot or for alternative relief.**
2. **Government opposition to appellee's motion to dismiss appeal as moot or for alternative relief.**
3. **Government supplemental opposition to appellee's motion to dismiss appeal as moot or for alternative relief.**
4. **The Opinion and Judgment Order in this appeal was filed on 2/24/97 .**

/s/ Laura L. Davis
Laura L. Davis
Case Manager
Direct Dial 597-5017

ORDER

The forgoing motion is/denied. Judge Becker would have dismissed the appeal as moot.

By the Court,
/s/ Carol Los Mansmann
Circuit Judge

Dated: MAY 28 1997

LD/cc: SC
SZL
MPD
TEM

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

NEHMET SEMIH SIDALI

v.

IMMIGRATION AND NATURALIZATION SERVICE; et al.

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA COWEN, NYGAARD, ALITO, ROTH, LEWIS
and MCKEE,
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
/s/ Carol Los Mansmann
Circuit Judge

DATED: JUL 24 1997

LD/cc: S.C., SZL, MPD, TEM.

Appendix C

Filed February 24, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

MEHMET SEMIH SIDALI

v.

IMMIGRATION AND NATURALIZATION SERVICE; THE UNITED STATES OF AMERICA; WARREN CHRISTOPHER, Secretary of State; CHARLES MCNEAL, Acting United States Marshal,

Appellants.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 95-cv-05665)

Argued
December 10, 1996
Before: BECKER, MANSMANN and GREENBERG,
Circuit Judges.

(Filed February 24, 1997)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

The government of Turkey sought the extradition of Mehmet Semih Sidali, a native of Turkey presently living in the United States, on the ground that he raped and murdered a fifteen-year old girl. After a hearing, a United States Magistrate Judge issued a Certification of Extraditability. Sidali subsequently petitioned the United States District Court for the District of New Jersey for a writ of habeas corpus on the ground that there was no probable cause to believe that he was guilty of the crimes for which he was charged. The district court granted Sidali's petition for habeas relief, and this appeal by the United States followed. We agree with the government that Sidali may be extradited because the requirement of probable cause was satisfied. We will therefore reverse the judgment of the district court and direct the court to deny Sidali's petition for a writ of habeas corpus.

I.[1]

In 1970, Sidali lived with his family in a two-story house in Mersin, Turkey. Sidali's parents lived on the second floor, and Sidali and his family lived on the first floor. Dursun Eskin, a fifteen-year-old girl whose mother had been a foster child of the family, also lived on the first floor.

On April 16, 1970, Sidali's father, daughter, and wife traveled to Ankara, Turkey, to obtain medical care for Sidali's father. While they were in Ankara, Sidali's aunt stayed with Sidali's mother in the Mersin house.

On the evening of April 17, 1970, the family's guard dog barked loudly, and Sidali's aunt called down to Dursun to make sure that she had not left the gate open. Dursun responded that she had not done so. Sidali arrived home at approximately 9:20 p.m. Thus, present in the house on the night of April 17, 1970, were Sidali, Sidali's mother, Sidali's aunt, and Dursun.

Several hours later, on the morning of April 18, 1970, Sidali's mother came downstairs and found Dursun dead. Dursun had been raped and murdered, strangled with Sidali's wife's belt that had been taken from a closet on the first floor of the home.

When the police arrived, Sidali suggested that a thief had broken into the house. The police examined the balcony door of the living room and discovered that there were two points at which force had been applied with an old screwdriver between the door and the frame. In addition, there was an iron sliding bar attached to the glass, but the frame into which it should have fit was not in place and could not be found. The doors were locked, however, and investigators stated that the

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[1] The facts and procedural history are stated comprehensively in the district court's opinion, *Sidali v. Immigration & Naturalization Serv.*, 914 F. Supp. 1104 (D.N.J. 1996), and in the opinion of the magistrate judge, *Matter of Extradition of Sidali*, 899 F. Supp. 1342 (D.N.J. 1995). We repeat only those facts that are necessary to our decision of the case.

evidence of tampering was not recent and that the doors did not appear to have been forced.

A physical examination of Sidali did not show any bruises or scratches on his hands, neck, face or body. Blood found on Dursun's bed sheet and underwear was Dursun's blood type and not Sidali's. A small blood stain was found on Sidali's pajama top, and a second blood spot was found on a cloth in a waste basket, but they were both deemed to be too small to yield accurate blood group typing. Sidali explained that the blood on his pajama top came from a mosquito bite the night before the murder, and that the cloth had been used to clean a small cut on his son's forehead a few days prior. Investigators did not attempt to identify the blood type of a sperm stain found on Dursun's sheet.

In May 1971, Sidali was arrested for the rape and murder of Dursun. He was tried before a three-judge panel of the First High Criminal Court of Mersin.[2] Pursuant to the Turkish Code of Criminal Procedure ("TCCP"), *translated* in The American Series of Foreign Penal Codes, Turkey, at the end of a trial (or within one week thereafter), the judgment is pronounced by a reading thereof. TCCP Art. 261. The judgment must include a declaration of the justification for the judgment. *Id.*

At the end of Sidali's trial, the trial court voted two to one to issue a judgment of acquittal. The majority justified its decision by stating that the evidence was neither sufficient nor concrete enough to convict, that there were no witnesses, and that blood and semen samples could not be tested. Sidali was released.

In Turkey, verdicts of acquittal may be appealed to the Supreme Court of Appeals. TCCP Art. 289. An appeal may be taken only for the reason that the judgment is contrary to law,

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[2] There are no jury trials in Turkey. Affidavit of Turgut Aydin, General Director of International Law and Foreign Relations of the Turkish Ministry of Justice, App. 219, 220.

TCCP Art. 307, and the Court of Appeals may reverse the judgment on the points where the law is violated. TCCP Art. 321. The Court of Appeals may find a "violation of the law" based on the facts determined as the basis for judgment. *Id.*[3] If it votes to reverse the judgment of the trial court, the Court of Appeals forwards the file to the originating court for a review of its own decision and for a new judgment. TCCP Art. 322.

In this case, the Mersin Prosecutor and the victim's mother (as intervenor) appealed the trial court's judgment of acquittal. In February 1973, the appeal was heard and decided by the First Criminal Panel of the Supreme Court of Appeals, which found that the judgment of acquittal was based on evidence which was "not in line with the existing quality of evidence." The court also found that the majority did not disprove the evidence raised by the dissenting opinion. Because the trial court's decision was therefore "contrary to law," the court reversed the judgment of acquittal. TCCP Art. 321.

Thus the First High Criminal Court of Mersin was required to conduct a retrial. A panel of three judges, with only the Chairman the same as at the first trial, reviewed the evidence. On July 16, 1976, the panel voted unanimously to acquit Sidali. The court reasoned that Sidali's body did not show any signs of a struggle, that it would not have been impossible for an intruder to have entered Sidali's home, that Sidali had no motive to kill Dursun, and that Sidali would have destroyed incriminating evidence. The court therefore "persisted" in the original judgment; that is, the court adhered to its earlier judgment of acquittal despite the prior opinion from the Court of Appeals.

Decisions to persist are reviewed by the Court of Appeals' General Board of Criminal Panels, which is composed of the

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[3] "A judgment which does not include justification for the result reached" is also considered an absolute violation of law. TCCP Art. 308(7).

Heads of Departments and members of the Criminal Panels of the Court of Appeals. On December 13, 1976, the General Board voted 24 to 8 that the reasons cited by the trial court to persist in the previous judgment were not sufficient. The General Board wrote that "it was clearly seen from the sufficient and convincing evidence that the accused [Sidali] transgressed the fifteen year old victim's virginity . . . and murdered the victim with his wife's belt." The General Board "annull[ed] the judgment for the acquittal of the accused."

Sidali applied for a passport on or about December 17, 1976. Believing that Sidali was acquitted, the Turkish government gave Sidali clearance, and Sidali received his passport on December 20, 1976. Sidali applied for a visa to come to the United States and left Turkey on or about December 31, 1976. Sidali has lived openly in the United States since January 2, 1977, and he became a permanent resident of the United States on September 17, 1990.

II.

The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty, and in the absence of a treaty the government has no duty to surrender a fugitive to a foreign government. *Factor v. Laubenheimer*, 290 U.S. 276, 287, 54 S.Ct. 191, 193 (1933); *see also Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882, 107 S.Ct. 271 (1986).

The extradition treaty between the United States and Turkey provides for the reciprocal extradition of persons, found within the territory of one of the nations, who have been accused or convicted of certain criminal offenses committed within the jurisdiction of the other nation. Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turkey, Article 2, T.I.A.S. No. 9891. If the United States agrees to seek the extradition of an individual pursuant to the request of a foreign government, the United States files an extradition complaint in an appropriate court charging an individual with committing an extraditable offense pursuant to the relevant extradition treaty. 18 U.S.C. § 3184.

A.

On February 9, 1982, Turkey made a request to the United States for Sidali's extradition. For over a decade the United States failed to take any action to extradite Sidali.[4]

On October 31, 1994, however, the United States filed an extradition complaint on behalf of Turkey in the District of New Jersey charging Sidali with rape and murder, which are extraditable offenses in the extradition treaty between the United States and Turkey. The magistrate judge issued a warrant for Sidali's arrest, and Sidali was arrested on November 16, 1994.

Because the power to extradite derives from the President's power to conduct foreign affairs, extradition is an executive, not a judicial, function. *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 828 (11th Cir. 1993); *see generally* U.S. Const. art. II, § 2, cl. 2. Thus, "the judiciary has no greater role than that mandated by the Constitution, or granted to the judiciary by Congress." *Austin v. Healey*, 5 F.3d 598, 600 (2d Cir. 1993), *cert. denied*, 510 U.S. 1165, 114 S.Ct. 1192 (1994).

In response to a complaint seeking extradition, the court conducts a limited inquiry. *See* 18 U.S.C. §§ 3181-95. The purpose of the proceeding is to determine whether an individual who has been arrested in the United States, pursuant to a complaint filed on behalf of a foreign government, is subject to surrender to the government of the requesting country. *Charlton v. Kelly*, 229 U.S. 447, 460, 33 S.Ct. 945, 949 (1913). The court conducts a hearing to determine whether there is "evidence sufficient to sustain the charge [against the defendant] under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. In other words, the court determines whether there is probable cause to believe that the defendant is guilty of the crimes charged. If the evidence is sufficient, the court makes a finding of extraditability and

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[4] Sidali asserts that the United States took action only after Turkey extradited a narcotics trafficker to the United States.

certifies the case to the Secretary of State. *Id.*; *see also Martin*, 993 F.2d at 828.

A magistrate judge[5] held Sidali's extradition hearing on September 20, 1995.[6] Two days later, the magistrate judge found Sidali extraditable and certified his case to the Secretary of State. *Matter of Extradition of Sidali*, 899 F. Supp. 1342, 1347 (D.N.J. 1995). In addition to other findings not before us on appeal, the magistrate judge found that (1) the General Board convicted Sidali of rape and murder, and (2) the United States established probable cause to believe that Sidali committed the crimes. According to the magistrate judge, either finding, standing alone, was sufficient to support his finding of probable cause under 18 U.S.C. § 3184. Sidali moved for reconsideration on October 3, 1995, but his motion was denied.

B.

Because extradition orders do not constitute "final decisions of a district court," they cannot be appealed under 28 U.S.C. § 1291. *See Collins v. Miller*, 252 U.S. 364, 369, 40 S.Ct. 347, 349 (1920). Rather, an individual seeking to challenge a magistrate judge's extradition order must pursue a writ of habeas corpus.

On August 24, 1995, while Sidali's extradition proceedings were pending, Sidali filed an application for naturalization with the Immigration and Naturalization Service, requesting expedited consideration. On November 6, 1995, Sidali filed a complaint in the United States District Court for the District of New Jersey in which he challenged INS' failure to act on his application for naturalization. On December 6, 1995,

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[5] 18 U.S.C. § 3184 permits a magistrate judge to conduct extradition proceedings if authorized to do so by "a court of the United States." Local Rule 40(B)(12) provides this authorization in the District of New Jersey.

[6] The September 20 hearing followed a complicated procedural history that is detailed in *Matter of Extradition of Sidali*, 899 F. Supp. 1342, 1345-46 (D.N.J. 1995).

while Sidali's complaint was pending before the district court, the Secretary of State issued a warrant for Sidali's surrender to Turkey.[7]

On December 12, 1995, Sidali amended his complaint by adding two counts seeking habeas corpus review of the magistrate judge's decision. The district court had jurisdiction over Sidali's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The scope of habeas corpus review of a magistrate judge's extradition order under a treaty with a foreign country is extremely limited. "[H]abeas corpus is available only to inquire whether the magistrate [judge] had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542 (1925); *see also Smith v. United States*, 82 F.3d 964, 965 (10th Cir. 1996); *Ludecke v. U.S. Marshal*, 15 F.3d 496, 497 (5th Cir. 1994); *Austin*, 5 F.3d at 600; *Martin*, 993 F.2d at 828; *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980).

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[7] After the courts have completed their limited inquiry, the Secretary of State conducts an independent review of the case to determine whether to issue a warrant of surrender. 18 U.S.C. § 3186. The Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations--factors that may be beyond the scope of the magistrate judge's review. The Secretary of State's decision is not generally reviewable by the courts. *Martin*, 993 F.2d at 829; *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.), *cert. denied*, 449 U.S. 1036, 101 S.Ct. 612 (1980).

To the extent that Sidali contends that we should affirm the judgment of the district court on humanitarian grounds unrelated to the finding of probable cause, we note that it is the function of the Secretary of State--not the courts--to determine whether extradition should be denied on humanitarian grounds. *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

In his request for habeas corpus relief, Sidali did not challenge the magistrate judge's jurisdiction, and he conceded that the offenses charged were within the applicable treaty. Instead, Sidali argued that there was no evidence warranting the finding that there was reasonable ground to believe him guilty of the rape and murder of Dursun. In other words, Sidali claimed that there was no evidence supporting a finding of probable cause.

On January 31, 1996, the district court granted Sidali's petition for habeas corpus relief. 914 F. Supp. 1104 (D.N.J. 1996).[8] The district court found that the United States did not prove that Sidali was actually convicted of the rape and murder of Dursun. *Id.* at 1112. The court also found that there was no probable cause to believe that Sidali raped and murdered Dursun. *Id.* at 1114. Since the district court concluded that there was no evidence warranting the finding that there was reasonable ground to believe Sidali guilty, the district court granted Sidali's petition for a writ of habeas corpus. This timely appeal followed.

III.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 2253, which provides that a final order issued by a district judge in a habeas corpus proceeding is subject to review by the United States Court of Appeals for the circuit in which that district court is situated.

On review, we focus our attention on the issue of probable cause; that is, whether there exists reasonable ground to believe the accused guilty of the crimes charged. Here the United States attempts to establish probable cause in two ways. First, the United States argues that Sidali was actually convicted of the rape and murder of Dursun and that the conviction is sufficient proof that probable cause exists. Second,

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[8] The district court also dismissed the counts relating to the INS, 914 F. Supp. at 1114-15 n.11. Sidali has not appealed that part of the district court's order.

the United States contends that the magistrate judge's finding of probable cause is supported by competent evidence of record.

A.

The United States contends, and Sidali does not dispute, that a foreign conviction obtained after a trial at which the accused is present is sufficient to support a finding of probable cause for the purposes of extradition. *See Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991) ("To hold that such convictions do not constitute probable cause in the United States would require United States judicial officers to review trial records and, consequently, substitute their judgment for that of foreign judges and juries. Such an inquiry would be inconsistent with principles of comity."); Restatement (Third) of the Foreign Relations Law of the United States § 476 comment b (1987) ("With respect to persons whose extradition is sought after conviction in the requesting state, the requirement [of probable cause] is met by proof of the judgment of conviction and, where appropriate, of sentence."); *see also Mosley v. Wilson*, __F.3d__, 1996 WL 709746, at *5 (3d Cir. Dec. 11, 1996) (conviction that has not been reversed ordinarily precludes finding of lack of probable cause for underlying proceeding).

At issue, then, is whether the General Board convicted Sidali of rape and murder. It is apparent that the General Board annulled the trial court's second judgment of acquittal, found that Sidali raped and murdered Dursun, and remanded the case to the trial court. As Sidali argues, however, the General Board never explicitly stated that Sidali was actually "convicted" or "guilty." We must therefore decide whether the General Board remanded the case back to the trial court (1) for a third trial on the issue of guilt or (2) simply to impose sentence. If the judgment of the General Board constituted a conviction under Turkish law, and if the case was remanded to the trial court for sentencing only, then we must reverse the judgment of the district court.

Our analysis requires us to decide issues of Turkish criminal law and procedure. The determination of foreign law in the federal courts is a question of law. Fed.R.Civ.P. 44.1; *Grupo Protexa v. All American Marine Slip*, 20 F.3d 1224, 1239 (3d Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 481 (1994). Consequently, we exercise plenary review over the district court's interpretation of relevant Turkish law. *Id.*; *Mobile Marine Sales, Ltd. v. M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985).

Our decision turns on whether the Turkish trial court was bound by the General Board's determination of guilt. If the trial court could have revisited the issue of Sidali's guilt in a third evidentiary trial, we would agree with Sidali that the General Board did not convict Sidali. The Turkish Code of Criminal Procedure makes clear, however, that the General Board's determination of guilt was final and binding. TCCP Article 326 provides:

> The courts have the right to insist on their first judgment when their judgment is reversed by the Court of Appeal, but they are obliged thereafter to abide by decisions given by the General Criminal Board of the Court of Appeal.

Thus, the Court of Appeal did not convict Sidali when it reversed the trial court's *first* judgment; on remand, the trial court could have insisted (and did insist) on its judgment of acquittal. In contrast, the trial court did not have discretion to insist on its *second* judgment when that judgment was reversed by the General Board. Decisions of the General Board are therefore final. When the General Board voted to annul the trial court's second acquittal, it did not send the case back for a third trial; instead, its decision on the issue of guilt was final and the case was remanded for sentencing only. In other words, the decision of the General Board constituted a conviction under Turkish law.

Sidali asserts that the General Board's failure to use the word "conviction" precludes us from determining that Sidali was convicted. We disagree. The General Board's statements

were clear and unequivocal. While we acknowledge that inclusion of the word "conviction" in the General Board's decision would have simplified our analysis, we do not believe that the word "conviction" is necessary to establish the existence of a conviction under Turkish law. It is clear that the trial court could not disagree with the General Board's finding of guilt.

Our interpretation of the decision of the General Board finds support in documents submitted by the parties.[9] In a diplomatic note dated February 17, 1995, the Embassy of Turkey explained:

> Pursuant to the laws of the Republic of Turkey, Mehmet Semih Sidali has been convicted by the General Board of the Supreme Court of Appeals. . . . Since the highest Turkish criminal appellate court has ruled in this matter, there is no appeal from that decision. Mr. Sidali will not be entitled to a new trial. . . .

Diplomatic Note from Turkish Embassy (Feb. 17, 1995), App. 208. The Embassy continued:

> Under this Article [326], the trial court cannot set aside or ignore the ruling of the General Board. The trial court cannot reopen the case to hear new evidence. It must follow the General Board's decision without question. Therefore, upon Mr. Sidali's

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[9] When determining questions of foreign law, we may consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed.R.Civ.P. 44.1; *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993). We may conduct our own research and are not confined to information available to or considered by the district court. *Grupo Protexa*, 20 F.3d at 1239; *Mobile Marine Sales, Ltd.*, 776 F.2d at 89; *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir.), *cert. denied*, 434 U.S. 940, 98 S.Ct. 432 (1977); *see also* Fed.R.Civ.P. 44.1 advisory committee's note ("[The court] may engage in its own research and consider any relevant material thus found.").

> return, the trial court will fix the duration of the sentence only.

Id.[10] Likewise, the Mersin Prosecutor stated that the General Board's decision was

> final and binding. . . . The judgment is final and absolute, and the trial corut [sic] has begun retrying the matter for determining the amount of punishment to be imposed to the accused; and in the meantime for the accused who was found conclusively guilty, Mehmet Semih Sidali, was issued a warrant of arrest in absentee.

Supplemental Request for Extradition (Sept. 25, 1992), App. 65, 70-71.

In an Addendum Request of Extradition, the Mersin Prosecutor stated that Sidali had "been pronounced decisively guilty." Addendum Request of Extradition (Sept. 25, 1992), App. 192, 198-99; *see also* Extradition Letter dated March 31, 1983, App. 15 (Sidali "was found guilty"); Ministry of Foreign Affairs Memorandum dated March 5, 1993, App. 179, 180-81 (Sidali's judgment of acquittal "was reversed and he was convicted"); Extradition Letter dated November 1, 1985, App. 48, 49 ("this verdict is final and binding under the existing Turkish legal system"). According to the General Director of International Law and Foreign Relations of the Turkish Ministry of Justice, the decision of the General Board "is binding, meaning that the issue [of guilt] cannot be further

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[10] The district court stated that the diplomatic note "should not have been admitted into evidence" and that the absence of the author's signature and qualifications rendered the document virtually irrelevant. 914 F. Supp. at 1111. Initially, we note that admissibility is not an issue, since we may consider inadmissible material when deciding questions of foreign law. Fed.R.Civ.P. 44.1. In addition, the fact that the note was submitted under seal of the Turkish Embassy and was presented to the court under oath of a U.S. Attorney lessens any concern we may have about the absence of a signature.

discussed. . . . [T]he guilt of the defendant can no longer be debated." Aydin Aff., App. 219, 225.

These writings convey a clear message: Sidali was found guilty by the General Board and the Turkish trial court was not permitted to hold otherwise on remand. We find these writings to be persuasive, and they support our conclusion that Sidali was convicted of the rape and murder of Dursun.

The district court did not find these writings to be persuasive because some documents stated that Sidali should be returned to Turkey for his "trial" and that Sidali was "charged" and "accused" of the crimes. 914 F. Supp. at 1111-12. Under Turkish law, however, the "trial" has not been completed because Sidali was never sentenced. Aydin Aff., App. 219, 225-26. The word "trial" used in this sense described the remaining sentencing proceedings. The Attorney General of Mersin explained:

> The retrial of the accused after having been acquitted two times, does not mean "to be tried for a second time". We have explained . . . this General Board examined the file and pronounc[ed] with overwhelming majority that the present evidences cause the conviction, so the trial continues. . . .

Statement of the Attorney General of Mersin (May 26, 1993), App. 184, 185-86. The other evidence submitted by the United States supports this interpretation. We believe that the use of the word "trial" in this context does not mean that Sidali will receive a new evidentiary trial to determine whether he raped and killed Dursun. Instead, we are satisfied that Sidali has been conclusively pronounced guilty and that his upcoming "trial" will be for the purposes of sentencing only.[11]

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[11] The use of the words "charged" and "accused" likewise do not persuade us that Sidali was not convicted. *See, e.g.*, Supplemental Request for Extradition (Sept. 25, 1992), App. 65, 70-71 ("the accused . . . was found conclusively guilty"); Declaration of Thomas A. Johnson, App. 312

(Footnote continued)

In addition to expressing concern about the words "trial," "charged," and "accused," the district court observed that some of the Turkish documents suggest that Sidali's guilt has not been conclusively determined. *See, e.g.*, Statement of the Attorney General of Mersin (May 26, 1993), App. 184, 198 ("[T]he Trial Court was [to] begin to try the accused for the third time."). While we acknowledge the ambiguities in the record, we are ultimately persuaded that the General Board convicted Sidali.

As the magistrate judge correctly concluded, evidence of Sidali's conviction, obtained after a trial at which Sidali was present, is sufficient to support a finding of probable cause. We hold that the conviction of Sidali by the General Board establishes reasonable grounds to believe that Sidali is guilty of the crimes charged.

B.

Our conclusion that the General Board convicted Sidali of rape and murder is the first of two independent grounds for reversing the judgment of the district court. In addition to the conviction, which is *per se* probable cause, competent evidence also exists in the record to support the magistrate judge's conclusion that probable cause exists to believe that Sidali is guilty of the rape and murder of Dursun.

We note that the probable cause standard applicable in extradition proceedings is identical to that used by courts in federal preliminary hearings. *See Sindona v. Grant*, 619 F.2d 167, 175 (2d Cir. 1980); *Castro Bobadilla v. Reno*, 826 F. Supp. 1428, 1433 (S.D. Fla. 1993), *aff'd*, 28 F.3d 116 (11th Cir. 1994). The burden of the government is to offer evidence that "would support a reasonable belief that [the defendant] was guilty of the crime charged." *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). The probable cause standard applicable in extradition proceedings has been described as

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(explaining that use of word "charges" in certain documents was not intended to imply absence of conviction).

"evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *United States v. Wiebe*, 733 F.2d 549, 553 (8th Cir. 1984) (quoting *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973).

The role of the magistrate judge in an extradition proceeding is, therefore, "to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." *Peters v. Egnor*, 888 F.2d 713, 717 (10th Cir. 1989) (quoting *Collins v. Loisel*, 259 U.S. 309, 316, 42 S.Ct. 469, 472 (1922)). As we observed almost seventy years ago:

> It is not necessary in extradition proceedings that the evidence against the respondent be such as to convince the committing judge or magistrate of his guilt beyond a reasonable doubt, but only such as to afford reasonable ground to believe that the accused is guilty of the offense charged.

United States ex rel. Lo Pizzo v. Mathues, 36 F.2d 565, 568 (3d Cir. 1929).

Here the magistrate judge found probable cause for extradition. We must uphold the magistrate judge's probable cause finding if there is any competent evidence in the record to support it. *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996); *Bovio v. United States*, 989 F.2d 255, 258 (7th Cir. 1993); *see also Ludecke*, 15 F.3d at 497 (appellate court must determine whether there is "any competent evidence tending to show probable cause"); *Peters*, 888 F.2d at 717 (habeas corpus appellate review turns on whether there is "*any* evidence of probable cause" supporting magistrate judge's finding).

Upon careful review of the record, we find that competent evidence of record indeed supports the magistrate judge's finding of probable cause.

Initially, the evidence suggests that the crimes were committed in Sidali's home at a time when Sidali was the only

male resident in the home. The record includes the following evidence that tends to show that it would have been impossible (or at least very unlikely) for an intruder to have committed the crimes: (1) the family's loud and hostile attack dog guarded the premises throughout the night; (2) the dog, who barked viciously at intruders, barked once early in the evening before the murder, but did not bark again that night;[12] (3) the property was secured by a wall with a bolted gate, barred windows, and locked doors; (4) while there were signs that one door was tampered with, the investigators stated that the evidence of tampering was not recent; and (5) investigators stated that the door was locked and did not appear to have been forced open.

The district court placed great emphasis on the notion that "mere presence at the scene of a crime does not constitute probable cause." 914 F. Supp. at 1114. While this statement may be true, the United States established more than mere presence in this case. The evidence suggests that Sidali was the *only* male resident present in the home at the time of the murder and that there were no intruders on the night of the murder. Thus, in addition to presence and opportunity, the evidence suggests that *no one but Sidali could have committed the crimes.* This factor distinguishes this case from those cited by Sidali. We believe that a person of ordinary prudence and caution could conscientiously entertain a reasonable belief of Sidali's guilt.

In addition to evidence that Sidali was the only person with an opportunity to commit the crimes, additional evidence was offered that supports a finding of probable cause. For example: (1) blood was found on Sidali's pajamas and on a cloth in

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[12] While one witness did testify that she heard "a dog" barking that night, there is no testimony that the barking dog was Sidali's dog. In addition, when Sidali's dog barked earlier in the evening, the barking prompted the residents to look around the premises and call to Dursun. The barking later in the evening did not prompt any concern. These facts support the United States' argument that Sidali's dog did not challenge an intruder on the night of the murder.

the garbage; (2) Dursun was strangled with a belt belonging to Sidali's wife; (3) Sidali stated that someone stole his key, but money located near the key was not disturbed; and (4) Sidali appeared "in a tousled-up state" when the investigators arrived, disturbing the crime scene by "attempt [ing] to upturn the objects in the wardrobes and drawers." Verdict of the Supreme Court, App. 55, 56.

The evidence tying Sidali to the rape and murder of Dursun may be less than overwhelming. The district court's comments regarding the adequacy of the autopsy and investigation are well-taken. Turkey was not required, however, to conduct a perfect investigation, and it was not required to present its entire case in this country. The evidence presented need only "support a reasonable belief that [Sidali] was guilty of the crime[s] charged." *Austin*, 5 F.3d at 605 (quoting *Ahmad*, 910 F.2d at 1066). The evidence presented to the magistrate judge sufficed for this limited purpose.

The magistrate judge reviewed the evidence and determined that probable cause exists to believe that Sidali was guilty of the crimes charged. Because competent evidence in the record supports the magistrate judge's finding of probable cause, our limited scope of review prevents us from contradicting that determination. *Austin*, 5 F.3d at 605 (citing *Quinn*, 783 F.2d at 815).

IV.

The General Board convicted Sidali of the rape and murder of Dursun, and that conviction is sufficient evidence of probable cause. Independent of the conviction, competent evidence of record supports the magistrate judge's determination that probable cause exists to believe that Sidali is guilty of the crimes. For both of the foregoing independent reasons, we will reverse the judgment of the district court and direct the court to deny Sidali's petition for a writ of habeas corpus.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix D

In the Matter of The EXTRADITION OF Mehmet Semih SIDALI, A Fugitive From Turkey.

No. 94-39A-01.

United States District Court,
D. New Jersey.

Sept. 22, 1995.

United States filed for certificate of extradition on behalf of Turkey against fugitive found guilty of rape and murder of young girl. The District Court, Hughes, United States Magistrate Judge, held that: (1) rape and murder satisfied "dual criminality" requirement for extradition; (2) rape and murder were crimes encompassed within extradition treaty; (3) "conviction" by Turkish appellate court and independent evidence established probable cause; (4) lapse of time did not preclude prosecution or extradition; (5) defense to extradition for one tried in United States did not apply to fugitive; (6) extradition treaty did not prohibit extradition of fugitive who was in process of applying for naturalization; (7) conviction which would have been in violation of double jeopardy rights in United States did not prevent extradition; (8) constitutionality of extradition statute would not be considered; and (9) fugitive would be released pending final outcome in light of special circumstances.

Certificate issued.

1. Extradition and Detainers k14(1)

In extradition hearing, district court's duty is to determine whether there is probable cause to believe ftigitive committed acts alleged.

2. Extradition and Detainers k14(1)

In ruling on extradition request, only questions which extraditing court may make are: whether there is applicable extradition treaty between requesting and requested parties

which is in full force and effect; whether charges are pending against person to be extradited in requesting nation; whether treaty authorizes extradition for crimes alleged to have been committed; and whether there is probable cause to believe that crime was committed and that person to be extradited committed it.

3. Extradition and Detainers k5

Alleged acts of rape and murder satisfied "dual criminality" requirement for fugitive's extradition to Turkey, in that acts were punishable in both nations, even if conviction after acquittal would have been precluded as double jeopardy in United States. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

4. Extradition and Detainers k5

"Rape" and "murder" were crimes easily encompassed by extradition treaty terms and obvious intentions of both United States and Turkey, since rape and murder were crimes punishable for at least period of one year; interpretation that "homicide to conceal evidence" was outside treaty would have been unduly restrictive.

5. Extradition and Detainers k14(2)

When individual to be extradited has already been convicted, all that is necessary to establish probable cause is record of judgment of conviction.

6. Extradition and Detainers k14(2)

Judgment of Turkish appellate court, which overturned trial court's acquittal of fugitive on rape and murder charges and found him guilty, constituted "conviction" sufficient to support finding of probable cause for purposes of fugitive's extradition to Turkey; furthermore, independent evidence also established probable cause that fugitive committed rape and murder.

7. Extradition and Detainers, k14(2)

Testimony and other evidence presented by person subject to extradition could only be used to explain and not contradict government's evidence.

8. Extradition and Detainers k14(1)

Determination on weight and credibility of evidence is properly left to trial court and not extradition court.

9. Extradition and Detainers k1

Prosecution of fugitive for rape and murder was not precluded by lapse of time in either United States or Turkey, and therefore extradition could not be prevented on that basis; constitutional and statutory speedy trial rights were unique to United States and status as fugitive would toll Turkish statute of limitations. U.S.C.A. Const. Amend. 6; 18 U.S.C.A. § 3161 et seq.

10. Extradition and Detainers k1

Defense to extradition pursuant to treaty provision for fugitive who "has been tried and acquitted or punished with final and binding effect in the Requested Party for the offense for which extradition is requested * * * " was inapplicable to extradition of fugitive for rape and murder in Turkey, since fugitive was not tried, acquitted, or punished in United States; purpose of section was to ensure that individual to be extradited would not be tried for same crime in both requesting and requested nations.

11. Extradition and Detainers k6, 9

Although extradition treaty prohibited extradition of nationals, treaty did not prohibit extradition of fugitive who was in process of applying for naturalization, nor was extraditing court required to stay extradition action pending naturalization proceeding.

12. Extradition and Detainers k1, 14(l)

Fact that Turkish criminal procedure by which fugitive's two trial court acquittals were overturned on appeal would have violated United States Constitutional right to be free from double jeopardy could not prevent extradition of fugitive to Turkey; to apply violation of double jeopardy to citizens of other countries was outside scope of extraditing court's authority. 18 U.S.C.A. § 3184.

13. Extradition and Detainers k14(1)

Although potential death sentence fugitive faced upon extradition to Turkey for rape and murder seemed unfair given history of two trial court acquittals, extended lapse of time since alleged acts, and fugitive's unblemished record while in United States, punishment did not rise to level of "shocking the conscience" to justify exception to rule of non-inquiry in extradition proceeding.

14. Extradition and Detainers k9

District court would decline to consider constitutionality of extradition statute, or to dismiss extradition proceedings, pending final resolution of *Lobue v. Christopher,* in which statute was found to be unconstitutional as violation of separation of powers.

15. Extradition and Detainers k15

Precarious physical condition of fugitive, task of reconstructing events relating to alleged rape and murder that happened in Turkey nearly quarter century earlier, and fact that extradition statute was found to be unconstitutional by court in other district constituted "special circumstance" justifying release after certificate of extraditability was issued pending final resolution of extradition by appellate courts and Secretary of State.

Andrew O. Schiff, Assistant United States Attorney, Trenton, New Jersey.

SuZann Lamb, Sara Criscitelli, Department of Justice, Washington, DC.

Thomas E. Moseley, Strykers, Tams & Dill, Newark, New Jersey.

Michael P. DiRaimondo, New York City.

MEMORANDUM OPINION

HUGHES, United States Magistrate Judge.

This matter comes before the Court upon the Government's complaint seeking the extradition of Mehmet Semih Sidali for the rape and murder of a fifteen-year-old girl. Among other arguments, Mr. Sidali claims that in view of two acquittals in the lower courts in the Republic of Turkey, his extradition would constitute a great injustice. The Court conducted an extradition hearing on September 20, 1995, and has reviewed the written submissions of the parties. For the following reasons, the Court will issue a certificate of extraditability.

I. *BACKGROUND*

On April 17, 1970, Dursun Eskin, who was staying with the Sidali family in Turkey, was brutally raped and murdered. Thereafter, there were at least two separate findings of no probable cause for arrest by Turkish Magistrates when the local prosecutor sought to charge Mr. Sidali with the crimes. Afterward, according to Turkish law, the victim's family petitioned for a trial. The petition was granted and a full trial on the merits was conducted. This trial culminated in an acquittal on June 7, 1972 by a 2-1 vote of a judicial panel which considered the evidence. The victim's family then secured an appeal to the Turkish Court of Appeals which remanded the case for retrial on May 28, 1973. A second judicial panel, by unanimous vote, acquitted Mr. Sidali a second time after considering the evidence on May 17, 1976.

On December 17, 1976, Mr. Sidali traveled to the Turkish capital to secure a passport for travel to the United States. He was temporarily detained pending a check to assure that there

were no criminal charges against him. As a result of this check, he received not only a valid passport but also a document stating that he had been cleared of the specific crimes involved here. On December 13, 1976, the Turkish Court of Appeals, after reviewing the second acquittal, reversed that trial court and found Mr. Sidali guilty of the crimes. Mr. Sidali left Turkey on December 31, 1976. On March 29, 1977, the Turkish Court issued an absentia warrant for the arrest of Mr. Sidali.

II. *PROCEDURAL HISTORY*

On October 31, 1994, a complaint, seeking the extradition of Mr. Sidali from the United States to Turkey, was filed with the Court and a warrant was issued for his arrest. The basis for the complaint was the absentia warrant for Mr. Sidali's arrest issued by Turkish authorities after Mr. Sidali was convicted by the General Criminal Board of the Court of Appeals of the rape and murder of Dursun Eskin.

On November 16, 1994, Mr. Sidali was arrested by agents of the Federal Bureau of Investigation and brought before the Court. The prisoner was presented with the complaint, advised of various rights, and, without objection from the Government, afforded the legal assistance of the Federal Public Defender. After the Government requested that the prisoner be detained pending an extradition hearing, counsel for Mr. Sidali sought a continuance of the initial hearing in order to assemble evidence to be used in an application for release.

On November 18, 1994, the Court conducted a hearing during which it heard testimony of five character witnesses for Mr. Sidali, reviewed numerous letters attesting to his good character, and considered the written and oral arguments of both counsel. That same day, the Court filed a Memorandum Opinion and Order detaining Mr. Sidali and remanding him to the custody of the United States Marshal pending a ftill extradition hearing.

Thereafter, on January 3, 1995, counsel for Mr. Sidali filed a motion for reconsideration of the November 18, 1994

detention order, principally claiming that newly discovered information justified release pending a full extradition hearing. Mr. Sidali claimed that, contrary to assertions in the Government's affidavit supporting the complaint for extradition, the "conviction" forming the basis for the absentia warrant is not final but merely requires a new (or third) trial for Mr. Sidali on the original rape and murder charges. The Court conducted a hearing on the renewed application for release on bail on January 26, 1995.

As a result of this hearing, the Court filed a Memorandum Opinion and Order, dated January 27, 1995, finding that Mr. Sidali presented no risk of flight and had demonstrated special circumstances justifying release. The specific special circumstances that this Court found were the unique history of acquittals and the high probability of success, in that, if he were returned to Turkey he would be acquitted a third time. Thus, this Court found that Mr. Sidali's release on bail was justified. The Court imposed several conditions upon Mr. Sidali's release which were designed to insure that Mr. Sidali would not flee the jurisdiction. The Court also issued an Order on January 27, 1995 staying the Order granting bail pending appeal by the Government.

The Government appealed this Court's release order to the District Judge who found, based on the certification of Thomas A. Johnson and a 'diplomatic note' from the Turkish Embassy, dated February 17, 1995, that Mr. Sidali is not entitled to a new trial upon his return to Turkey. The District Judge also noted that these two documents were not before this Court at the time of its decision granting bail and that the fact that Mr. Sidali would not be afforded a new trial significantly impact[ed] on the reliability of [this Court's] findings regarding Mr. Sidali's risk of flight and probability of success. Accordingly, the District Judge vacated this Court's Order of January 27, 1995 granting bail and remanded this matter for further findings.

On April 17, 1995, upon remand, and after reviewing the same two new documents that the District Judge examined,

this Court determined that Mr. Sidali will not be afforded a new trial upon his return to Turkey, but will, instead, face a severe sentence. Thus, the Court found that there was, indeed, a high risk of flight and that Mr. Sidali's probability of success was significantly diminished. Accordingly, the Court found that release on bail pending a full extradition hearing was precluded and detained Mr. Sidali.

The extradition hearing originally was set for June 26, 1995, but was adjourned to September 20, 1995, at the request of Mr. Sidali's new attorneys, who were substituted in for the Federal Public Defender on May 25, 1995.

Subsequently, this Court denied additional motions for release upon grounds of Mr. Sidali's deteriorating physical condition. Mr. Sidali had been referred for testing and treatment for complaints of rectal bleeding, hypertension, and depression by the medical director of his place of incarceration. (Exhibit C-1)

At the extradition hearing, the Court considered the various exhibits offered and admitted into evidence, the competing "expert" affidavits relating to the interpretation of Turkish law (Exhibits G-6 and S-1), and heard the testimony of Mr. Sidali, his wife, and his physician. The Court then took the matter under advisement to again consider all of the evidence presented.

III. *DISCUSSION*

Mr. Sidali argues five primary reasons why his extradition is improper. First, he asserts that the Turkish request does not seek Mr. Sidali's surrender for an extraditable offense and fails to satisfy the requirement of dual criminality. Second, he argues that the Turkish request does not present sufficient evidence to warrant extradition because Mr. Sidali was not convicted in Turkey and because the Turkish evidence does not establish probable cause. Third, Mr. Sidali claims that his extradition is precluded by the defenses under Article 3 of the Treaty on Extradition & Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turk., Art. 3, T.I.A.S. No. 9891

[hereinafter Treaty]. Fourth, he claims that his extradition must be denied under Article 4 of the Treaty. Finally, he claims that the complaint for extradition must be denied as contrary to concepts of reciprocity and ftmdamental decency. Each of these arguments will be considered in turn after first discussing the authority of the Court.

A. *SCOPE OF REVIEW*

[1, 2] In an extradition hearing, the Court's duty is to determine whether a probable cause exists that the Respondent committed the acts alleged. *Spatola v. United States,* 925 F.2d 615 (2d Cir.1991). The only inquiries which the extraditing court may make are:

1) whether there is an applicable extradition treaty between the requesting and requested parties which is in full force and effect;

2) whether charges are pending against the person to be extradited in the requesting nation;

3) whether the treaty authorizes extradition for the crimes alleged to have been committed; and

4) whether there is probable cause to believe that a crime was committed and that the person to be extradited committed it.

See, Bingham v. Bradley, 241 U.S. 511, 516-17, 36 S.Ct. 634, 636-37, 60 L.Ed. 1136 (1916); *Gallina v. Fraser,* 177 F.Supp. 856, 860 (D.Conn.1959), *affd,* 278 F.2d 77 (2d Cir.1960), *cert. denied,* 364 U.S. 851, 81 S.Ct. 97, 5 L.Ed.2d 74 (1960).

B. *RESPONDENT'S ARGUMENTS*

1. *The Turkish Request Does Not Seek Mr. Sidali's Surrender For An Extraditable Offense and Fails To Satisfy The Requirement of Dual Criminality*

Mr. Sidali argues that Turkey has failed to demonstrate that the crime for which extradition is sought is covered by the present treaty or was covered by a previous treaty, Extradition

Treaty Between the United States of America and Turkey, August 6, 1923, Art. 43 [hereinafter Lausanne Treaty]. He contends that the crime with which he is charged in the extradition documents is the crime of "homicide to conceal evidence" and that such a crime is not covered by either the current treaty or the Lausanne Treaty. *See,* Treaty, Art. 2; Lausanne Treaty, Art. 11(l). Additionally, he argues that Turkey has failed to meet the "dual criminality" requirement. Specifically, Mr. Sidali contends that Turkey has failed to establish that the alleged crime for which extradition is sought is punishable in each country. *Republic of France v. Moghadam,* 617 F.Supp. 777, 784 (N.D.Cal.1985). Respondent asserts that the United States' constitutional limitation on double jeopardy would place the alleged acts in the instant case beyond the reach of American jurisdiction, and thus, the dual criminality requirement has not been satisfied.

[3] The Court finds that the dual criminality requirement has been satisfied because it is the "alleged acts" which must be punishable. Clearly, the alleged acts are punishable regardless of the notion of double jeopardy. The only inquiry the Court must make here is whether the alleged crime or act *is punishable* in each country. The answer to that question is clearly yes. The Court may not inquire into whether Mr. Sidali at this point in time, after two acquittals in Turkey, could be tried for the crime in this country.

[4] In addition, after reviewing the Treaty itself, it is clear to the Court that "rape" and "murder" are crimes easily encompassed by its terms and the obvious intentions of both countries. A finding that "homicide to conceal evidence" falls outside the treaty would be unduly restrictive. The Treaty clearly refers to [crimes] punishable for at least a period of one year. Rape and murder fit within that description.

Accordingly, the Court finds that Turkey seeks the surrender of Mr. Sidali for an extraditable offense and that the dual criminality requirement has been satisfied.

2. *The Turkish Request Does Not Present Sufficient Evidence To Warrant Extradition Because Mr. Sidali Was Not Convicted In Turkey And Because The Turkish Evidence Does Not Establish Probable Cause*

Mr. Sidali argues that he was not convicted of a crime in Turkey because the December 1976 decision following Mr. Sidali's second acquittal merely annulled the judgment acquitting Mr. Sidali and did not constitute a "conviction."

Additionally, Mr. Sidali asserts that the evidence presented by the Government does not establish probable cause because *he* presents evidence which rebuts or explains the Turkish evidence, and thereby demonstrates that probable cause does not exist.

[5] When an individual to be extradited has already been convicted, all that is necessary to establish probable cause is the record of the judgment of conviction. *See, Spatola, 925* F.2d at 618; *United States v. Clark,* 470 F.Supp. 976, 978 (D.Vt.1979); *In re Edmondson,* 352 F.Supp. 22, 24 (D.Minn. 1972).

Here, the Court has reviewed the actual judgment of the General Criminal Board of the Court of Appeals, analyzed the relevant Turkish law (principally Sections 325 and 326 of the Turkish Code of Criminal Procedure), and considered the written communications between the two countries in connection with this extradition request (principally the Certification and Diplomatic Note, dated 2/17/95) (Exhibit G-5). The Court has also considered the legal expert opinions offered by the Respondent and the Government. (Exhibits S-1 and G- 6). The Court adopts, as more persuasive given all the circumstances, the opinion that the action of the Turkish Court of Appeals resolves the issue of guilt or innocence and that there will be no third trial.

[6] Accordingly, the Court finds that the judgment of the Turkish Court, when considered in light of Turkish law, constitutes a final judgment or "conviction" and, thus, the element of probable cause is satisfied by that finding alone.

Notwithstanding the fact that the record of the judgment of conviction establishes probable cause, the Court also finds that there is sufficient independent evidence to establish probable cause. *See*, Treaty, Art. 7(l)(c) (the requesting party need only submit evidence which according to the law of the United States "would justify arrest and committal for trial of the person sought if the offense had been committed in the [United States]."); *See also, Bozilov v. Seifert,* 983 F.2d 140, 143 (9th Cir. 1992) (the evidence submitted need only establish probable cause.). The Court finds that the evidence presented by the Government is sufficient to establish probable cause.

The Government has presented evidence, through documents and otherwise, that independently establishes probable cause. *See, Shapiro v. Ferrandina,* 478 F.2d 894, 902-903 (2d Cir.1973), *cert. dismissed,* 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973). Among other facts, the Government has shown that the victim lived in Mr. Sidali's home; that she was raped and strangled; that Mr. Sidali had the opportunity to commit the crime; that Mr. Sidali was the only man living in the home at the time; that there was no conclusive proof that anyone else had entered the house; and that blood was discovered on Mr. Sidali's pajama sleeve shortly after the crime.

Though alone perhaps insufficient to permit a finding of proof beyond a reasonable doubt (a standard of proof here but not in Turkey), this evidence is enough to find probable cause that a crime was committed and that Mr. Sidali committed it.

[7, 8] Mr. Sidali has presented evidence, including his testimony, which may only be used to *explain* and not *contradict* the Government's evidence. *See, Oen Yin-Choy v. Robinson,* 858 F.2d. 1400, 1406 (9th Cir.1988), *cert. denied,* 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989). Here, Mr. Sidali seeks to have the Court weigh the testimony and make credibility determinations as to the ultimate issue of guilt or innocence. That determination is properly left to the trial court and not the extradition court. *See, Gill v. Imundi,* 747 F.Supp. 1028,1045 (S.D.N.Y.1990).

Accordingly, the Court also finds that the Turkish request does present sufficient evidence to establish probable cause thereby justifying extradition.

3. *Mr. Sidali's Extradition Is Precluded by Defenses Under Article 3 of The Treaty*

Mr. Sidali claims that under Article 3 of the Treaty there are certain defenses available to him which would preclude extradition. Specifically, Mr. Sidali claims that extradition cannot be granted when the person to be extradited is "immune by reason of lapse of time from prosecution or punishment for the extraditable offense, under the laws of either the Requesting or the Requested Party." Respondent's Br. at 16. Mr. Sidali argues that the time limitation for punishment under Turkish law expired in 1985, and thus, his extradition is untimely. Additionally, he argues that his extradition is also barred as untimely under the laws of this nation. Respondent contends that, pursuant to the right to a speedy trial guaranteed by the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161 et seq., extradition is barred.

[9] The Court finds that Mr. Sidali is not immune from punishment by reason of lapse of time under the laws of either the United States or Turkey. Speedy trial rights, as provided by our Constitution and statute, are, of course, unique to this country and, thus, offer no relief to Mr. Sidali. In addition, Mr. Sidali argues that the Turkish statute of limitations bars prosecution but he fails to acknowledge the generally accepted legal principle that his fugitive status would serve to toll the running of such a statute.

Further, Mr. Sidali asserts that, pursuant to Article 3(l)(d) of the Treaty, which states that if the person to be extradited "has been tried and acquitted or punished with *final and binding effect in the Requested Party* for the offense for which extradition is requested . . .", extradition must be denied. He argues that his extradition is barred by the notion of double jeopardy because his [two] prior acquittal[s] would be given final and binding effect in this country and he could not be prosecuted here.

[10] The Court finds that Mr. Sidali is incorrect in this assertion because the clear wording of the Treaty states that the person to be extradited must have been "tried and acquitted or punished ... in the Requested Party." Mr. Sidali has not been tried, acquitted or punished here and, thus, Article 3(l)(d) is inapplicable to the current situation. The Court believes that this section of the Treaty was drafted to ensure that the individual to be extradited would not be tried for the same crime in both the requesting and requested nations. In the instant case, Article 3(l)(d) cannot be invoked because Mr. Sidali has not been tried, acquitted, or punished here.

Accordingly, Mr. Sidali's extradition cannot be prevented on these grounds.

4. *Mr. Sidali's Extradition Must Be Denied Under Article 4 of the Treaty*

Mr. Sidali argues that pursuant to Article 4(3) of the Treaty there is a prohibition against extraditing nationals. He argues that because he is eligible for naturalization and is currently in the process of applying for citizenship, he cannot be extradited. Alternatively, he asserts that this extradition proceeding should be stayed pending the outcome of his naturalization proceeding.

[11] The Court finds that while Respondent is correct in his assertion that Article 4(3) of the Treaty does prohibit the extradition of nationals, Mr. Sidali overlooks one important point. Mr. Sidali is not a naturalized citizen and this Court is not required to stay this proceeding pending any naturalization proceeding. Additionally, the Court notes that the one significant difference between the instant case and those cases cited by Mr. Sidali is that the respondents in those cases were already naturalized citizens.

Accordingly, the extradition of Mr. Sidali is not barred on these grounds.

5. *Extradition Must Be Denied As Contrary To Considerations of Reciprocity And Fundamental Decency*

Mr. Sidali argues that treaties should be construed as imposing reciprocal obligations upon each party to the treaty and that there is no basis for such reciprocity when some aspect of the criminal process of the requesting state is completely contrary to the process in the requested state. Thus, Respondent asserts that there is no basis for reciprocity here and that he should not be extradited to Turkey because his extradition would be contrary to our nation's constitutional right to be free from double jeopardy.

[12] The Court finds that this contention does not bar extradition because it is outside the scope of this Court's statutory authority, pursuant to 18 U.S.C. § 3184, to apply a violation of this country's double jeopardy rights to citizens of other countries. *See, Plaster v. United States,* 720 F.2d 340 (4th Cir. 1983). Parenthetically, this case should cause citizens of the United States to stop a moment to appreciate the many significant freedoms which they routinely enjoy.

Finally, Mr. Sidali argues that there is an exception to the rule of "non- inquiry" where the individual to be extradited would be subject to procedures or punishment so contrary to the United States' sense of decency that such extradition should be denied. *See, Gallina v. Fraser,* 278 F.2d 77, 79 (2d Cir.1960), *cert. denied,* 364 U.S. 851, 81 S.Ct. 97, 5 L.Ed.2d 74 (1960). Mr. Sidali asserts that this case presents just such an instance. He contends that, because the history of his case in Turkey runs contrary to our prohibition against double jeopardy, his extradition is barred. For essentially the same reason, Mr. Sidali argues that sending him back to face a [potential] death sentence in light of his two prior acquittals would violate due process and "shock the conscience" of the Court as being completely contrary to our country's sense of decency. *See, Ahmad v. Wigen,* 726 F.Supp. 389, 410-415 (E.D.N.Y.1989), *aff'd,* 910 F.2d 1063 (2d Cir.1990).

[13] Although Mr. Sidali's punishment, if the conviction were to continue to stand in Turkey, remains uncertain, the Court must nevertheless concede that it has serious concerns about what has happened here. Extradition, given the history of two acquittals, when coupled with the lapse of time and Mr. Sidali's unblemished (and open) record in this country, must strike one, on first blush, as being unfair. But this uneasiness does not legally rise to the level of "shocking the conscience," thereby justifying an exception to the general rule of "non-inquiry."

In the extradition of fugitives between sister states in this country, for example, the executive branch may sometimes elect not to return a fugitive, found to be extraditable by the courts, based upon "fairness" concerns. Similarly here, the general fairness of a requesting country's system of justice, and how it operates in a specific case, is better left, ordinarily, to the Secretary of State. This country has chosen to enter a treaty with Turkey through the executive branch and it is the executive branch that must reconcile the high ideals of the United States with the Turkish system of justice and how it was applied to Mr. Sidali's case.

This Court cannot legally substitute its judgment for that of foreign courts in how to fairly adjudicate cases in their own countries. Nor can this Court second-guess the wisdom of the Executive Branch in entering a treaty with another country in its effort to protect the interests of the United States in our ever-increasing global society.

Accordingly, the Court finds that extradition is not barred on these particular grounds.

C. *CONSTITUTIONALITY OF 18 U.S C. § 3184*

Mr. Sidali points to a recent decision, by the United States District Court for the District of Columbia, that the federal extradition statute, 18 U.S.C. § 3184, is unconstitutional, as a further basis for dismissal of the complaint here. He has filed a formal motion to "terminate extradition proceedings."

Essentially, the Court in *Lobue v. Christopher,* 893 F.Supp. 65 (D.D.C.1995), concluded that the extradition statute violates the separation of powers doctrine by permitting the Secretary of State to "review" decisions of extradition judges.

Initially, the Court notes that, as an extradition judge, the *Lobue* decision, involving a declaratory judgment action in another district, has no binding effect here. Moreover, as the *Lobue* court notes, in discussing the propriety of whether the *habeas* court in that case should also consider the constitutionality issue, a full consideration [here] would result in "an unnecessary duplication of judicial resources and piecemeal adjudication of this important issue . . . " *Lobue,* at p. 77.

By subsequent order, dated September 15, 1995, the *Lobue* court (1) granted class certification, to include Mr. Sidali and others awaiting extradition, (2) enjoined the Government from surrendering any person to a foreign government, and (3) declined to enjoin extradition proceedings in this case or other pending cases.

In passing, the Court simply notes its belief that the function of the Secretary of State is not to "review" a judicial decision but rather is something wholly different. The executive decision is much more expansive than the judicial decision. The Executive Branch must consider a wider variety of factors in determining whether to actually extradite an individual once a certificate of extraditability has been issued. *See, In re Extradition of Koskotas,* 127 F.R.D. 13 (D.Mass. 1989), *order modified,* 740 F.Supp. 904 (D.Mass.1990), *aff'd,* 931 F.2d 169 (1st Cir.1991). Only the State Department, and not the Judiciary, may inquire into the motive behind a foreign nation's request for extradition.

[14] Nevertheless, the Court declines to decide the constitutionality issue in favor of a full appellate review of *Lobue,* which has already begun.

Accordingly, the Court will deny the pending motion to terminate the extradition proceedings and will decline to rule

on the claim that the extradition statute is unconstitutional, pending final resolution of *Lobue*.

IV. *DETERMINATION*

A. *FINDINGS OF FACT*

1. On April 17, 1970, a 15-year-old girl, who had been living in Mr. Sidali's home, was raped and murdered.

2. On June 6, 1972, Mr. Sidali was acquitted by a local panel of judges.

3. After remand, Mr. Sidali was again acquitted by a local panel of judges on July 16, 1976.

4. On December 13, 1976, the General Criminal Board of the Court of Appeals reversed the local court and imposed a final judgment of guilty.

5. Mr. Sidali had the opportunity to commit the crimes alleged.

6. Mr. Sidali was the only man living in the house at the time of the alleged crimes.

7. There is inconclusive proof to demonstrate that another man entered the house at the time of the crime.

8. Shortly after the crime, blood was discovered on Mr. Sidali's pajama sleeve.

9. Mr. Sidali left Turkey on or about December 31, 1976.

10. An arrest warrant was issued in Turkey for Mr. Sidali's arrest on March 29, 1977.

B. *CONCLUSIONS OF LAW*

1. A judicial proceeding on a request for extradition is limited. *Fernandez v. Phillips,* 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925); *Hooker v. Klein,* 573 F.2d 1360 (9th Cir.1978).

2. The Judicial Branch should not ordinarily inquire into the criminal procedures of other countries. *Neeley [Neely] v. Henkel*, 180 U.S. 109, 21 S.Ct. 302,45 L.Ed. 448 (1901).

3. The judgment of the General Criminal Board of the Court of Appeals of Turkey constitutes a "conviction" and is sufficient to support a finding of the probable cause necessary to extradite Mr. Sidali. *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir.1991).

4. Alternatively, the evidence produced by the Government sufficiently establishes probable cause that crimes were committed and that Mr. Sidali committed them. (*see*, Findings of Fact, 5-8)

5. A treaty, between the United States and Turkey, concerning the extradition of international fugitives, is in full force and effect.

C. *COMPLETION OF THE RECORD*

Future reviewers of this record may be unable to assess the true depth of genuine desolation exhibited by Mr. Sidali and his family throughout his various appearances before the Court over the last ten months. Nor should any reviewer misconstrue the determination to issue the certificate of extraditability and disregard the legitimate concerns of the Court in this case.

Nevertheless, the Court's duty is clear and the certificate of extraditability shall issue. A man has been convicted by Turkish Courts of rape and murder. An international warrant was issued for the arrest of that man. Pursuant to its treaty with Turkey, the United States filed a complaint requiring his extradition. Mr. Sidali is this man.

Notwithstanding these findings and conclusions, this Court respectfully requests that the Secretary of State make further inquiry into the propriety of this particular extradition.

V. *RELEASE PENDING FURTHER APPLICATIONS*

It is apparent to the Court that the issuance of a certificate of extraditability will not end this case as Mr. Sidali will pursue his vindication by filing a petition for a writ of habeas corpus and by applying to the Secretary of State for permission to remain in this country. In addition, he will, no doubt, take action in Turkey to set aside his conviction, which occurred almost twenty years ago for a crime that occurred almost twenty-five years ago. Finally, the constitutionality of the extradition statute itself has been questioned. The final resolution of these remaining issues will obviously take considerable time.

[15] Mr. Sidali is a sick man who faces a very formidable task. His precarious physical condition and the extraordinary task of re-assembling events that occurred almost a quarter of a century ago constitute "special circumstances" justifying his release pending a final decision by Appellate Courts and by the Secretary of State. *See, Salerno v. United States,* 878 F.2d 317 (9th Cir.1989).

In addition, the extradition statute which constitutes the authority for returning this man to Turkey has been found by a competent Court to be unconstitutional. This factor (never addressed in the one-hundred-and-fifty year history of this statute or its predecessors) also constitutes a "special circumstance", as the very authority to return this person to Turkey is in equipoise.

Of course, the Court has also considered risk of flight in the wake of the issuance of the certification of extraditability. The Court has reconsidered its decision of April 17, 1995, and finds that Mr. Sidali does not present a risk of flight if certain stringent conditions on release are imposed. The Court has now heard Mr. Sidali testify under oath subject to cross examination. In addition, the Court has considered the entreaties of his neighbors, responsible members of the community who continue to remain firm in his support even after hearing the full presentation of the Government's evidence. Finally, the

Court has considered the unwavering commitment of support by family members and Mr. Sidali's devotion to them.

Ordinarily, release for a person who has been found to be extraditable would be, for lack of a better expression, out of the question. Although rare, certain respondents in other cases have been permitted release even after the issuance of a certificate of extraditability. *See*, for example, *Arnbjornsdottir-Mendler v. United States,* 721 F.2d 679 (9th Cir.1983).

Here, the Court has observed Mr. Sidali, his family, and neighbors extensively for ten months and is firinly convinced that he is a person who shall face the responsibility of confronting these charges in either the United States of America or the Republic of Turkey. Specifically, the Court finds that this individual will not jeopardize, and more importantly, will not dishonor, his family by fleeing from his responsibilities.

Accordingly, Mr. Sidali shall be released pending final resolution of this matter in the United States, upon satisfaction of the following conditions:

1. $500,000 unsecured appearance bond to be co-signed by:

   a. his wife

   b. each of his two adult children and

   c. three (3) financially responsible members of the community to be approved by the Court;

2. Mr. Sidali's wife and son to be third party custodians as defined by 18 U.S.C. Section 3142(c)(B)(i);

3. home detention, except as expressly approved by Pretrial Services, with electronic surveillance to be paid for by Mr. Sidali;

4. report on daily basis to Pretrial Services; and

5. travel restricted to Mercer County, New Jersey.

Appendix E

Mehmet Semih SIDALI, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents.

Civil A. No. 95-5665 (MTB).

United States District Court,
D. New Jersey.

Jan. 31, 1996.

Petitioner sought habeas corpus review of his extradition order for rape and murder in Turkey for which he had been twice acquitted at trial there. The District Court, Barry, J., held that: (1) magistrate judge erred in finding that petitioner had been convicted of crime through judgment of General Criminal Board of Court of Appeals in Turkey that annulled his second acquittal, and (2) United States did not establish probable cause to believe that petitioner committed crime based on evidence that victim lived in petitioner's home and that small blood stain was discovered on petitioner's pajama sleeve.

Writ of habeas corpus granted.

1. Habeas Corpus k527

Habeas corpus review of magistrate judge's order of extradition must be concerned only with whether alleged offense fell within terms of extradition treaty and whether official with jurisdiction was presented with sufficient evidence to warrant finding that there was reasonable ground to believe petitioner was guilty. 28 U.S.C.A. § 2241.

2. Extradition and Detainers k39

Extradition orders are not final decisions of district court which are appealable as of right. 28 U.S.C.A. § 1291.

3. Habeas Corpus k525.1

Person who is to be extradited may obtain review of extradition by seeking writ of habeas corpus. 28 U.S.C.A. § 2241.

4. Habeas Corpus k527

Scope of habeas corpus review of magistrate judge's order of extradition is narrower than in habeas proceedings traditionally provided for American convictions. 28 U.S.C.A. § 2241.

5. Habeas Corpus k527

District court's habeas corpus review of magistrate judge's order of extradition is limited to whether magistrate judge had jurisdiction, offense charged was within treaty, and probable cause existed to find accused guilty.

6. Extradition and Detainers k39

Foreign judgment of conviction obtained after trial at which accused was present is sufficient proof that reasonable cause exists to find accused guilty for extradition purposes. Restatement (Third) of the Foreign Relations Law of the United States § 476, comment.

7. Extradition and Detainers k29

Magistrate judge erred in finding that habeas petitioner had been convicted of 1970 rape and murder in Turkey, as basis for finding that he was subject to extradition there, though judgment of General Criminal Board of Court of Appeals in Turkey annulled petitioner's second acquittal, where it did not by its terms impose conviction or make finding of guilt; there was evidence that petitioner would be retried in Turkey and that he was merely being accused of committing crime.

8. Extradition and Detainers k39

United States did not provide competent evidence for probable cause to believe that accused committed 1970 rape and-murder charged, as required to support his extradition to

Turkey, though victim lived in accused's home and lentil-sized blood stain was discovered on accused's pajama sleeve shortly after crime, where there was no evidence that accused was even present when rape and murder occurred, and there was nothing linking blood stain to crime.

9. Extradition and Detainers k39

To find whether there was probable cause to believe that accused committed crime charged, as required for extradition, magistrate judge's function is not to decide accused's guilt or innocence but only whether there is competent evidence to justify holding accused to await trial.

10. Extradition and Detainers k39

In determining whether to issue order certifying extraditability, magistrate judge does not weigh conflicting evidence or make factual determinations; rather, he or she looks only to see if there is evidence sufficient to show reasonable grounds to believe accused guilty.

11. United States Magistrates k26

In reviewing magistrate judge's determination of probable cause to believe that accused committed crime charged, warranting extradition, district court must assess whether there is any competent evidence to support his or her finding.

12. Extradition and Detainers k28.1

To establish probable cause for extradition purposes, there must be something more than accused's mere presence in location where crime occurred and something more than mere opportunity to commit crime.

13. Extradition and Detainers k39

It is permissible in extradition proceeding for accused to explain ambiguities or doubtful elements bearing upon probable cause.

Thomas E. Moseley, Stryker, Tams & Dill, Newark, New Jersey, for Plaintiff.

Andrew O. Schiff, Assistant United States Attorney, Trenton, New Jersey, for Defendants.

OPINION

BARRY, District Judge.

INTRODUCTION

After a delay of Rip Van Winkle-like proportions, the United States sought petitioner's extradition to the Republic of Turkey even though he had been twice acquitted at trial before Turkish courts of the crime as to which extradition was sought and even though he may now face the death sentence. The only reason apparent from the record to explain why petitioner was plucked up almost twenty years after he legally entered the United States and more than twelve years after Turkey first requested his extradition was because Turkey had recently extradited, at the United States' request, a convicted drug dealer who had escaped from the Cook County (Chicago) jail and fled to Turkey. It appears, as well, that this is the first time that the United States has sought extradition of one found not guilty at two separate trials, and the first time since the Treaty between the United States and Turkey was entered into in 1979 that the United States has attempted to extradite anyone at all to Turkey.

The Magistrate Judge who handled the extradition request believed, correctly, that his review was constrained to answering certain discrete questions. The answers to those questions warranted, in his view, granting the certificate of extradition. He believed, as well, and again correctly, that it was only the Secretary of State who could review all of the circumstances of the case and, for humanitarian reasons, deny extradition. He urged, in two opinions, that the most careful review be undertaken by the Secretary. Indeed, one cannot read the record of the proceedings before the Magistrate Judge and come away with any conclusion other than that he expected that the Secretary's review would result in the denial

of extradition. The Magistrate Judge asked the United States, for example, "Doesn't it strike you as unfair that someone has been acquitted twice at trials, has lived openly and apparently with an unblemished record in this country for ... almost twenty years[?]". Tr., Sept. 20, 1995 at 164. The United States responded "No", and the Secretary has again responded "No" by ordering that petitioner be extradited. Thus, the petition for habeas corpus, now before this court, is most likely petitioner's last hope of remaining in this country, which he legally entered on January 2, 1977 with a Turkish passport after Turkish authorities had concluded that he had been acquitted and where he has openly lived a law abiding life since that time.

[1] Some preliminary observations must be made. This court, on habeas review, is reviewing, under the appropriate standard of review, what the Magistrate Judge has determined and not issues such as whether petitioner, if extradited, will be granted due process and treated humanely in Turkey or whether all of the circumstances of the case warrant relief on humanitarian grounds. Those issues are for the Executive Branch, which possibly considered them and certainly determined them against petitioner. A habeas court is and must be concerned only with whether the alleged offense fell within the terms of an extradition treaty and whether an official with jurisdiction was presented with sufficient evidence to warrant a finding that there was a reasonable ground to believe that petitioner was guilty. *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir.1990). The *Ahmad* court was confident that this well understood and fairly narrow scope of review was all that was necessary because "[s]o far as we know, the Secretary never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court's sense of decency [citation omitted]. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so." *Id.* at 1067.

This court will not determine because it need not determine--even if it were empowered to determine--whether this case presents such a situation and, if so, whether this court

would be required to trample on the oath it took which, most assuredly, it would not do. Neither will this court determine because it need not determine whether, aside from the possible or probable or certain "procedures or punishment" petitioner will face, this saga--which began more than twenty-five years ago--warrants relief as a matter of fundamental fairness. These issues need not be reached because the Magistrate Judge erred in finding that the United States proved that petitioner is under a judgment of conviction in Turkey and, in the alternative, that there was probable cause that petitioner committed the crime as to which extradition was sought. And so, while the parties have various motions and cross-motions now before this court, motions which will be briefly addressed and disposed of *infra,* the critical issue is whether the petition for a writ of habeas corpus should be granted. The answer to that question is a ringing "Yes."

STATEMENT OF THE CASE

A. *The Crime and Investigation in Turkey*[1]

In 1970, petitioner Mehmet Semih Sidali lived with his family in a two-story house in Mersin, Turkey. Petitioner's father and mother lived on the upper floor, while petitioner and his family lived on the first floor. *Id.* Dursun Eskin, a fifteen year old girl whose mother was the adopted child of the family, also lived on the first floor. On the morning of April 18, 1970, Dursun was found dead in her bedroom. The autopsy report indicated that she had been raped and, thereafter, killed by strangulation.[2]

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[1] The background facts surrounding both the crime and the investigation are largely undisputed with the battle being fought solely over whether those facts support a finding of probable cause and then only if petitioner is not already under a judgment of conviction. This court will only cite to the record when an alleged fact is in dispute. All citations are to the English translations, where there have been translations.

[2] Dursun was strangled with a belt that came from a dress belonging to petitioner's wife. The dress was found hanging in the wife's closet.

The day before the rape and murder, petitioner's father, daughter, and wife had gone to Ankara so that the father could receive medical treatment. While they were away, petitioner's aunt came to keep his mother company. Thus, Dursun aside, the people in the house on the night the murder was committed were petitioner, his mother, and his aunt, and they all slept upstairs.

On the night of the murder, petitioner came home at about 9:20 p.m., changed into his pajamas, and went upstairs to bed. The next morning, petitioner came downstairs at 7:30 a.m. and noticed that the key to a safe that had been in his jacket pocket was missing. He called his place of business, but nothing had been disturbed. In the meantime, petitioner's mother came downstairs, opened Dursun's bedroom door, and found that she was dead. Dursun had last been seen alive early on the evening of the murder when the family's dog barked loudly and continuously, and before petitioner returned home.

When the police arrived, petitioner suggested that a thief had broken into the house. He told them that the key to his safe had been taken but that no money was missing. He also pointed them to the balcony door of the living room, from which he believed an intruder had entered the house. An examination of the door revealed that there were two points at which force had been applied with an old screwdriver between the door and the frame. *Inspection Report,* April 19, 1970 (attached at *Pet.'s Br.*, Exh. F.) Moreover, there was a red iron sliding bar attached to the glass, but the frame into which it should have fit was not in place and could not be found. The four screws which held the sliding bar were loosened as a result of having been forced. *Id.* The investigation determined, however, that there was nothing missing from the house, that nothing in the house had been disturbed, and that there were no fingerprints on the door, the locks of the windows, or the buckle of the belt which was used to strangle Dursun. Interestingly, the same officer who made the report on the day of the murder found, two days later and with no explanation for the switch in stories, "not any attempt that proved intrusion . . . using any tools like screwdrivers. . . ."

High Criminal Court of Mersin, Republic of Turkey, July 6, 1972 ("First Trial Ruling") at 18, attached at Pet.Br., Exh. D; Resp.App., Ex. 2.

A physical examination of petitioner showed no bruises or scratches on his hands, neck, face, or body, or the area surrounding his penis. Blood found on Dursun's bed sheet and underwear was determined to be Type O, Dursun's blood type and not petitioner's, and investigators did not attempt to identify the blood type of a sperm stain found on the sheet. Neither were blood spots on a cloth found in a waste basket and a blood spot on petitioner's pajama top tested because they were deemed to be too small to yield accurate blood group typing.[3] Finally, no pathologist's report established the time of death.

B. *Legal Proceedings in Turkey*

On April 20, 1970, petitioner was arrested in connection with Dursun's death, detained for two months, and released in June 1970. In May 1971, he was charged with rape and murder and was again arrested and taken into custody. He was tried for nine months before the First High Criminal Court of Mersin, a three-judge panel. In a decision dated July 6, 1972, the court found that the evidence was neither sufficient nor concrete enough to convict petitioner, there were no witnesses to the crime, and blood and semen samples could not be accurately tested. First Trial Ruling at 25-26. Thus, by a vote of two to one, petitioner was found not guilty of murdering Dursun and was released.

Pursuant to Section 289 of the Turkish Code of Criminal Procedure ("TCCP"), the trial court's decision was appealed. The appeal was heard and decided by the First Criminal Panel

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[3] Petitioner explained at his extradition hearing that the spot of blood on his pajama sleeve was from a mosquito bite the night before the murder and that the cloth containing the blood stain had been used to clean a small cut on his son's forehead two or three days before the murder. Tr., Sept. 20, 1995, at 44-45, 69-70.

of the Supreme Court of Appeals on February 5, 1973. *Supreme Court of Appeals,* Feb. 5, 1973 ("Court of Appeals Decree") (attached at *Pet.'s Br.*, Exh. H; *Resp.App.*, Ex. 2). The court found that the judgment of acquittal was based on written evidence which was "not in line with the existing quality of evidence". *Id.* at 3. In addition, the court found that the majority below did not disprove the evidence raised by the dissenting opinion. *Id.* Because this was "contrary to the law", the court reversed the judgment, pursuant to Article 321 of the TCCP.[4] *Id.*

After the reversal by the Court of Appeals, the First High Criminal Court of Mersin was obligated to conduct a retrial, which it did. A panel of three judges, with only the Chairman the same as at the first trial, reviewed the evidence and, on July 16, 1976, voted unanimously to acquit petitioner. *First High Criminal Court of Mersin, Republic of Turkey,* Judgment, July 16, 1976, ("Second Trial Ruling"), at 36 (attached at *Pet.'s Br.*, Exh. I; *Resp.App.*, Exh. 2). The court was persuaded by the fact that petitioner's body showed no sign of a struggle and that it would not have been impossible for an intruder to have gotten into petitioner's home to commit the offense. *Id.* at 31, 33. The court did not believe that petitioner had a motive to kill Dursun and conjectured that if he had committed the offense, he would have had time to get rid of any incriminating evidence. *Id.* at 23-25. For these reasons, the trial court persisted in its original verdict.

Decisions to persist are reviewed by the Court of Appeals' General Board of Criminal Panels (the "General Board"). The General Board is composed of the Heads of Departments and members of the Criminal Panels of the Court of Appeals. By a

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[4] "The Court of Appeal reverses the judgment to which objection is raised on the points where the law is violated. If the violation of the law that caused the reversal of the judgment was based on the facts determined as the basis of the judgment, related proceedings are also reversed at the same time."

TCCP, Art. 321 (Fred B. Rothman Co. 1962).

vote of 24 to 8 on December 13, 1976, the General Board found that the reasons cited by the trial court were insufficient to insist on the previous judgment. *General Board of the Criminal Panels of the Supreme Court of Appeals,* Judgment of the Supreme Court of Appeals, Dec. 13, 1976 ("General Board Judgment"), at 6 (attached at *Pet.'s Br.*, Exh. J; *Resp.App.*, Exh. 2). Finding sufficient evidence that "the accused transgressed the fifteen year old victim's virginity . . . and murdered the victim with his wife's belt", the General Board "annull[ed] the judgment for the acquittal of the accused". *Id.* at 6-7.

Without knowledge of the General Board's December 13, 1976 decision and, thus, believing he had been acquitted, petitioner applied for a passport on or about December 17, 1976. He was detained by Turkish authorities from December 17 to December 20, 1976 and told he could not leave Turkey. On December 20, 1976, also believing petitioner had been acquitted, the Turkish government gave petitioner clearance, and he received his passport.[5] He applied for a visa to come to the United States and left Turkey on or about December 31, 1976.

C. *Proceedings in the United States*

Petitioner became a lawful permanent resident of the United States on September 17, 1990, and he has lived openly in the United States since his arrival on January 2, 1977. Records indicate that Turkey's first request for petitioner's extradition was made in or about February 1982. *Pet.'s Br.*, Exh. K. It appears, however, that because of what United States' officials conceded to be "various mistakes" as well as "confus[ion] . . . about the legal proceedings in Turkey," the United States took no action to extradite petitioner and the issue only surfaced in 1993, and then only after -- and because -- Turkey extradited Erdogan Kurap (a narcotics trafficker

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[5] The city of Ankara, Turkey's police chief wrote a letter authorizing the recession of the restraining order "as the subject person was acquitted of that crime." *Pet. 's App.*, Ex. C.

who, in 1992, escaped from the Cook County jail) to the United States. *Pet.'s Br.* at 8, Exh. L; Tr. Sept. 20, 1995 at 151.

On or about October 31, 1994, more than twelve years after the request for extradition had first been made, the United States commenced this extradition proceeding against petitioner by filing a complaint pursuant to 18 U.S.C. § 3184,[6] which complaint was assigned to United States Magistrate Judge John J. Hughes. The complaint alleged that petitioner had been convicted of a crime specified in the extradition treaty between Turkey and the United States (the "Treaty").[7] The Magistrate Judge issued a warrant for petitioner's arrest, and petitioner was arrested and detained on November 16, 1994.

The Magistrate Judge held an extradition hearing on September 20, 1995. At the hearing, petitioner raised six arguments as to why extradition was improper: (1) the Turkish request did not meet the requirement of dual criminality; (2) he was not convicted, and there is insufficient evidence to establish probable cause; (3) his extradition is barred by lapse of time; (4) his extradition is barred because he is in the process of applying for citizenship; (5) extradition should be denied for reasons of reciprocity and fundamental decency; and (6) 18 U.S.C. § 3184 is unconstitutional. *Id.* at 1346-50. After considering all of petitioner's arguments, by Memorandum Opinion and Order dated September 22, 1995, the Magistrate Judge certified petitioner's extradition. *In the Matter of the Extradition of Sidali,* 899 F.Supp. 1342 (D.N.J.1995). He found, as well, that petitioner did not present a risk of flight and ordered him released on bail. *Id.* at 1351-52.

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[6] Section 3184 permits a magistrate judge to conduct extradition proceedings if authorized to do so by "a court of the United States". 18 U.S.C. § 3184 (1995). Local Rule 40B(12) provides this authorization.

[7] *See* Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turkey, T.I.A.S. No. 9891 (attached at *Resp.App.*, Exh. 1).

Reconsideration was denied in a Memorandum Opinion and Order dated on October 27, 1995. *Am. Compl.*, Exh. C.

On November 6, 1995, petitioner filed the complaint in this action challenging the INS's failure to act on his application for naturalization. *Compl.*, ¶¶ 8-11. On December 6, 1995, the Secretary of State issued a warrant for petitioner's surrender to Turkey. On December 12, 1995, petitioner amended his complaint by adding two counts seeking habeas corpus review of the Magistrate Judge's decision. *Am.Compl.*, ¶¶ 15-18. On December 15, 1995, he filed a motion for a stay of his extradition pending review, which this court subsequently granted, and respondents cross-moved for dismissal of petitioner's claims against the INS, for summary judgment on his habeas corpus petition, and for revocation of bail, the last of which this court subsequently denied. Petitioner has also cross-moved for discharge under 18 U.S.C. § 3188.

DISCUSSION

[2, 5] Extradition orders do not constitute final decisions of a district court which are appealable as of right under 28 U.S.C. § 1291. A person who is to be extradited, however, may obtain review of an order of extradition by seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. *Collins v. Miller,* 252 U.S. 364, 369, 40 S.Ct. 347, 349, 64 L.Ed. 616 (1920); *Bozilov v. Seifert,* 983 F.2d 140, 142 (9th Cir.1993); *Spatola v. United States,* 925 F.2d 615, 617 (2d Cir.1991). The scope of habeas corpus review of a magistrate judge's order of extradition is quite narrow, however--narrower, in fact, than in the habeas proceedings traditionally provided for American convictions. *Escobedo v. United States,* 623 F.2d 1098, 1101 (5th Cir.1980); *Shapiro v. Ferrandina,* 478 F.2d 894, 901 (2d Cir.1973); *Spatola v. United States,* 741 F.Supp. 362, 369. The district court's review is limited to whether: (1) the magistrate judge had jurisdiction; (2) the offense charged is within the treaty; and (3) probable cause exists to find the accused guilty. *Yapp v. Reno,* 26 F.3d 1562, 1565 (11th Cir.1994); *Bozilov,* 983 F.2d at 142; *Spatola,* 925 F.2d at 617.

[6] There is no serious dispute as to whether the Magistrate Judge had jurisdiction or whether the offense charged is within the Treaty; rather, the dispute is over the element of probable cause. The United States argues, correctly, that a foreign judgment of conviction, obtained following a trial at which the accused was present, is sufficient proof that probable cause exists. *Spatola,* 925 F.2d at 618. *See* Restatement (Third) of the Foreign Relations Law of the United States § 476 cont. b (1987) ("With respect to persons whose extradition is sought after conviction in the requesting state, the requirement [of probable cause] is met by proof of the judgment of conviction and, where applicable, of sentence".). Petitioner does not disagree arguing, instead, that he has not been convicted and that probable cause does not otherwise exist.

Hundreds and hundreds of pages of exhibits were submitted to the Magistrate Judge--and to this court--in the parties' efforts to show that petitioner was--or was not--conclusively found guilty by the decision of the General Board in December 1976. The parties agree that the legal effect of the General Board's decision is the critical issue, at least as an initial matter. Thus, and aside from the host of other issues petitioner has raised, if that decision conclusively determined guilt even though sentence has not yet been imposed, extradition would appropriately have been ordered because petitioner would be deemed "convicted." The parties also agree that, if the General Board's decision did not conclusively determine guilt and, thus, that there was not a conviction, this court must press on and reach the question of whether the United States has shown probable cause that petitioner committed the crime with which he is charged. If the United States makes this showing, extradition, again, would appropriately have been ordered, petitioner's other issues aside. If, however, probable cause is lacking, the writ of habeas corpus will be granted, extradition denied, and the bulk of the remaining issues relegated to the cutting room floor.

A. *Was Petitioner Convicted?*

[7] The extensive submissions of the parties were distilled by the Magistrate Judge into one paragraph of his opinion, to wit:

> Here, the Court has reviewed the actual judgment of the General Criminal Board of the Court of Appeals, analyzed the relevant Turkish law (principally Sections 325 and 326 of the Turkish Code of Criminal Procedure), and considered the written communications between the two countries in connection with this extradition request (principally the Certification and Diplomatic Note, dated 2/17/95) (Exhibit G-5). The Court has also considered the legal expert opinions offered by the Respondent and the Government. (Exhibits S-1 and G-6). The Court adopts, as more persuasive given all the circumstances, the opinion that the action of the Turkish Court of Appeals resolves the issue of guilt or innocence and that there will be no third trial.

899 F.Supp. at 1347. This court's review of the Magistrate Judge's legal determination is plenary.

If one thing is clear, it is this: it is anything *but* clear whether petitioner has been convicted. Stated somewhat differently, the United States has failed in its burden of proof, and the Magistrate Judge erred in finding that it had not.

"Principally," in his word, the Magistrate Judge relied upon the diplomatic note, received by the Department of State on February 17, 1995, which, to be sure, said everything that had to be said for a finding of conviction, i.e. pursuant to Article 326 of the Turkish Code of Criminal Procedure, the judgment is final and all that remains is sentencing. *(Resp.App.*, Exh. 5). This note, however, as petitioner argued below, should not have been admitted into evidence--it was unsigned, there is no way of knowing who prepared it, and there is no indication either of that person's title or credentials or of any qualifications that person may or may not have had to opine on the

legal significance of Article 326 or of the General Board's decision. But even assuming that the Magistrate Judge correctly determined that these impediments went to weight, not admissibility, (Tr. Sept. 20, 1995 at 28-29), the weight of the note with these impediments was virtually nil.

The Magistrate Judge specified certain other evidence which prompted him to conclude that there had been a conviction. The critical document--the judgment of the General Board--itself, however, states only that it "annul[s] the previous judgment of the court" and does not by its terms impose a conviction or make a finding of guilt. And Turkish law, specifically Articles 325 and 326 on which the Magistrate Judge "principally" relied, add--and clarify--nothing. Article 325 applies only to judgments which have "been reversed in favor of the accused because of the violation of law regarding the application of the punishment." *TCCP,* Art. 325. Because the General Board annulled a judgment to the detriment of the accused, this provision is utterly inapplicable. Article 326 merely states that courts are "obliged . . . to abide by, decisions given by the General Criminal Board of the Court of Appeal." *TCCP,* Art. 326. It is impossible to "abide by" the General Board's decision, however, without knowing what was meant when the General Board "annull[ed]" the second acquittal, and that is anything but clear.

And so the court must turn to the written communications between the United States and Turkey in connection with this extradition request, communications which are all over the lot and so confused that the anonymous diplomatic note was submitted "to clarify statements contained in documents previously submitted by the Government of Turkey to the Government of the United States requesting [petitioner's] extradition. . . ." *Id.*, Declaration of Thomas A. Johnson, attached to Feb. 17, 1995 note at *Resp.App,* Exh. 5.

Some examples underscore the morass which preceded and prompted the "clarification." On November 1, 1985, for example, the Mersin Public Prosecutor wrote a memo to the Ministry of Justice describing the General Board's decision as

finding the second acquittal improper in light of the evidence presented which was found sufficient to punish petitioner, albeit he was still referred to as "the accused." *Resp.App.*, Exh. 4. Moreover, the September 25, 1992 Supplementary Request for Extradition by the Mersin Prosecutor stated that the General Board's decision was final and absolute and that the trial court had begun retrying the matter to determine the punishment to be imposed on "the accused," who was found "conclusively guilty." *Resp.App.*, Exh. 2.

Cutting the other way are exhibits such as the letter from the General Director, Directorate of Criminal Affairs, Republic of Turkey, dated April 15, 1993 to the Attorney General of Mersin attaching correspondence with reference to petitioner "who is being tried ... by the First Criminal Court of Mersin for charges of raping and strangling" the victim. The attached correspondence described petitioner as having been "accused of voluntary manslaughter," and asked, "What is the statute of limitations for the crime that has allegedly been committed by [petitioner] and when will it run?," and "Will [he] be able to present new evidence at trial [and] appeal the judgment?" *Pet.Br.*, Exh. L.

Also supportive of petitioner's position is the May 26, 1993 report of the Attorney General of Mersin, which stated that petitioner will be tried a "third time" and will be able to defend himself, call witnesses, offer new evidence and appeal an adverse result. The Certificate of the U.S. Ambassador to Turkey, which accompanied that report, described petitioner as "charged with" the crimes of rape and murder. *Pet.Br.*, Exh. M.

Clarification was surely needed; indeed, the Magistrate Judge, in his opinion of January 27, 1995 in which he reconsidered the denial of bail--and granted bail--stated that he was "not so sure that [it] is accurate" that the conviction is final and that there would be no other trial." "[T]he proposition remains far from clear," he continued, concluding that he was "inclined to believe that [petitioner] will be afforded a new trial if extradited to Turkey." Opinion, Jan. 27, 1995 at 9-10.

"[S]purred [into] action" by the Magistrate Judge, the United States "requested clarification from the Turkish Government." Tr., April 17, 1995, at 7-8. The Turkish government thereafter submitted the diplomatic note of February 17, 1995 which supposedly "reaffirmed the position" that all that remained was sentencing. *Id.*

Even assuming that the February 17, 1995 supposed "clarification" was admissible and assuming further that, if admissible and if accorded a reasonable modicum of weight, it would carry the day as to the issue of conviction, communications between the United States and Turkey subsequent to February 17, 1995 muddied the waters all over again. To be sure, the October 11, 1995 Declaration of Thomas A. Johnson, the author of the "clarification" declaration, stated that the position of the United States and Turkey on the fact of the conviction had been consistent. Exh. 5 to *Resp.* Reply Br. Unfortunately for the United States, however, other communications call this statement into question, including one from Mr. Johnson himself. Thus, in a letter of August 10, 1995, Mr. Johnson stated that Turkey sought extradition so that petitioner could "face charges", a statement he later repudiated as "inartful." *Pet.Br.*, Exh. K; Decl. of Thomas A. Johnson, Oct. 11, 1995, attached to Resp.Reply Br. "Charged with" language was used by the American Ambassador to Turkey on September 13, 1995 (Resp.Exh. 6); an October 20, 1995 memorandum from the Justice Ministry, Republic of Turkey, stated that petitioner was "to stand trial . . . on the charge. . . ."; and an October 24, 1995 memorandum of the panel present to try petitioner spoke of the "trial" and the fact that "trial" was postponed until January 25, 1996 when it was expected that petitioner would have been returned. Moseley Cert., Exh. B. And, of course, in addition to communications between the United States and Turkey which post-dated the diplomatic note, there was the predictably competing--and predictable--testimony of the parties' experts and the April 4, 1995 statement of petitioner's trial attorney that "[T]rial is underway . . . If the court finds the defendant guilty, he has a right to appeal. . . ." Pet.App., Exh. D.

If more were needed to come to the conclusion that the United States has not proved that petitioner was "conclusively guilty" and, in this court's view, it most assuredly is not, at oral argument the United States had to worm its way out of the statement in its reply brief that "[I]t may well be easier for [petitioner] to get a new trial in light of advances in forensics. . . ." Resp.Reply Br. at 6. And the final word on the matter, also at oral argument, was the concession by the Assistant U.S. Attorney that "We'll never know until he gets back to Turkey what the right answer [is] ... It could come out either way. . . ." Tr., 1/22/96, at 43, 45. Game, set, and match.

This court has conducted a *de novo* review of the evidence before the Magistrate Judge when he ruled on September 22, 1995 and concludes that the United States did not prove that the decision of the General Board constituted a final judgment or conviction and, to the extent the Magistrate Judge ruled otherwise, he erred. Moreover, the evidence which followed that ruling and which was presented either to the Magistrate Judge on reconsideration or to this court in the first instance, only underscores this failure of proof.

One final note. The Magistrate Judge denied petitioner discovery of documents relating to the first extradition request by Turkey and communications and correspondence between the United States and Turkey as to whether the General Board's decision constituted a conviction; indeed, the United States had not even provided petitioner with the formal extradition request made by Turkey in 1982 which it returned to Turkey without retaining a copy in its files.[8] While the Magistrate Judge was "not satisfied with the government's explanation" as to why all relevant documents had not been provided, he did not want to delay petitioner's "day in court". Tr., Sept, 20, 1995 at 16-19. Given this court's disposition,

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[8] The United States explained that extradition requests are returned "if the documents were found to be insufficient in some respect, and that usually means no identification evidence or it wasn't properly certified. . . ." Tr. Sept. 20, 1995 at 18.

the court need not determine whether the Magistrate Judge rightly or wrongly denied this discovery. In any event, this court has the abiding sense that more documents and correspondence would only have added to the confusion.

And so the court must press on. . . .

B. *Is There Probable Cause?*

[8] Having concluded that the United States did not prove a final judgment or conviction and, thus, that probable cause cannot be satisfied by the fact of conviction alone, this court must inquire as to whether there is competent evidence to establish probable cause. The Magistrate Judge found that the United States presented sufficient evidence that independently established probable cause. Again, in this court's view, he erred.

[9, 10] To issue an order certifying extraditability, the magistrate judge must find that there is probable cause to believe that the accused committed the crime charged.[9] To this end, the magistrate judge's function is not to decide the accused's guilt or innocence but only to determine whether there is competent evidence to justify holding the accused to await trial. *Collins v. Loisel,* 259 U.S. 309, 316, 42 S.Ct. 469, 472, 66 L.Ed. 956 (1922); *Bozilov,* 983 F.2d at 143; *Shapiro,* 478 F.2d at 900-01. The magistrate judge does not weigh conflicting evidence or make factual determinations; rather, he or she looks only to see if there is evidence sufficient to show reasonable grounds to believe the accused guilty. *Quinn v.*

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[9] The Treaty requires,

> A request relating to a person being prosecuted or who is charged with an offense, and who has yet to be convicted, shall be accompanied by the following: . . . Such evidence as, according to the laws of the Requested Party, would justify arrest and committal for trial of the person sought if the offense had been committed in the territory of the Requested Party.

Treaty, Ch. I, Sec. II, Art. 7(l)(c).

Robinson, 783 F.2d 776, 815 (9th Cir.1986); *Sayne v. Shipley,* 418 F.2d 679, 685 (5th Cir.1969).

[11] In reviewing the magistrate judge's determination of probable cause, the district court must assess whether there is any competent evidence to support his or her finding. *Quinn,* 783 F.2d at 815; *Eain v. Wilkes,* 641 F.2d 504, 508 (7th Cir.1981). The weight and sufficiency of that evidence is for the determination of the committing court. *Quinn,* 783 F.2d at 815; *Escobedo,* 623 F.2d at 1102.

While invoking the caveat "among other facts", the Magistrate Judge found only the following facts important enough to specify in reaching his conclusion: "[T]he victim lived in Mr. Sidali's home; . . . she was raped and strangled; . . . Mr. Sidali had the opportunity to commit the crime; . . . Mr. Sidali was the only man living in the home at the time; . . . there was no conclusive proof that anyone else had entered the house; and . . . blood was discovered on Mr. Sidali's pajama sleeve shortly after the crime". *Sidali,* 899 F.Supp. at 1347. Not surprisingly, this recitation calls to mind the Magistrate Judge's questions to the United States at the oral argument before him after reciting those very facts: "How many cases do you think [with] this kind and scope of evidence would survive a motion for judgment of acquittal at the end of the prosecution, if this were all the evidence?" "Do you think . . . any case would survive?" Tr. Sept. 20, 1995 at 141-42.

Most assuredly, it would not, and neither does this "evidence" establish probable cause. Three of the reasons specified by the Magistrate Judge for finding probable cause rest solely on the fact that the crime occurred in petitioner's home and that he was the only man living there that night. Even had there been evidence that petitioner was in his home when the crime occurred, mere presence at the scene of a crime does not constitute probable cause. *Ybarra v. Illinois,* 444 U.S. 85, 90, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979); *United States v. Soyland,* 3 F.3d 1312, 1313 (9th Cir.1993); *United States v. Soto,* 908 F.2d 209, 211 (7th Cir.1990); *United States v. Butts,* 704 F.2d 701, 703 (3d Cir.1981). This

is especially true when the scene of the crime is petitioner's home where his presence, if, indeed, he was present, is eminently reasonable.

But there is no evidence that petitioner was even present when the rape and murder occurred and *a fortiori* no evidence that he had the opportunity to commit the crime. Thus, there is no pathologist's report as to the time of death and no evidence aside from a "guesstimate" by the investigators that the victim--who was not seen by anyone after the barking dog prompted concern early in the evening--did not die before petitioner indisputably arrived home at 9:20 p.m.; indeed, the "autopsy," such as it was, was performed at the cemetery with the "preacher" assisting. And, wholly apart from the barking dog, there is evidence that there may well have been an intruder. While the Magistrate Judge correctly determined that that evidence was not conclusive, the surprising change of position of the same police officer a mere two days later is unexplained.

[12] In any event, to establish probable cause, there must be something more than mere presence and something more than mere opportunity. *See Soyland,* 3 F.3d at 1313 (requiring a "sufficient link" between the accused and the crime). The only "link" which the Magistrate Judge mentions is the "blood discovered on petitioner's pajama sleeve shortly after the crime." *Id.* at 1348. There is nothing linking this lentil-sized stain to the crime, however-- it was supposedly too small to be tested for blood typing, and there was no attempt to try. Similarly, and for whatever reason, the semen found at the scene was not tested, and no finger prints and no hair samples were found. There is utterly nothing linking petitioner to the crime.

[13] Parenthetically, at the extradition hearing, petitioner explained how the small blood stain on his pajama sleeve came to be.[10] It is permissible in an extradition proceeding for

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[10] The Magistrate Judge denied petitioner's request to have DNA testing done of the spot of blood and, in his Memorandum Opinion on

(Footnote continued)

the defendant to explain ambiguities or doubtful elements bearing upon probable cause. *Collins*, 259 U.S. at 315, 42 S.Ct. at 471. The Magistrate Judge misunderstood this explanation as an attempt to have him weigh the testimony and make credibility determinations as to guilt or innocence, determinations within the province of the trial court or jury, not the extradition court. *Sidali*, 899 F.Supp. at 1348. But there was no testimony whatsoever presented by the United States at the extradition hearing and no evidence that the blood on the pajama sleeve was anyone's but petitioner's. There was, therefore, nothing to weigh and nothing to contradict.

Explanations aside, there was no competent evidence warranting a finding of probable cause. The writ of habeas corpus will be granted.[11]

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reconsideration of the order of extradition and his discovery rulings, observed that the United States' "interest in maintaining effective diplomatic relations with Turkey far outweighs any legitimate need of [petitioner] in obtaining forensic evidence for use in an extradition hearing. . . ." Opinion, Oct. 27, 1995 at 5. While the "effective diplomatic relations" here is no more complicated than "You gave us our guy, we'll give you yours" and while the forensic evidence could well be dispositive, the United States, at oral argument before this court, was uncertain whether the pajama top still exists. Given this court's disposition on the issue of probable cause, it need not reach the thorny questions presented by the Magistrate Judge's ruling and the potentially missing evidence.

[11] Given this disposition, the motions pending before the court can be disposed of summarily. Respondents' motion for summary judgment on Counts Three and Four of the Amended Complaint--the habeas corpus claims--is, of course, denied, as is their motion to commit petitioner to the custody of the Attorney General pending his surrender to Turkish officials. Respondents' motion to dismiss Counts One and Two--which seek to compel INS action on petitioner's application for naturalization--is granted, there being no showing at this time that such action has been unlawfully withheld. Petitioner's cross-motion for discharge under 18 U.S.C. § 3188 is denied as moot, as is his motion to file a Second Amended Complaint.

ORDER

For the reasons expressed in this court's opinion of even date,

IT IS on this 31st day of January, 1996

ORDERED that defendants'/respondents' motion (1) for summary judgment on Counts Three and Four of the Amended Complaint be and hereby is denied; for committal of plaintiff/petitioner to the custody of the Attorney General pending his surrender to Turkish officials be and hereby is denied; and (3) for dismissal of Counts One and Two of the Amended Complaint be and hereby is granted; and it is further

ORDERED that plaintiff's/petitioner's cross-motion for discharge under 18 U.S.C. § 3188 and motion to file a Second Amended Complaint be and hereby are denied as moot; and it is further

ORDERED that the petition for habeas corpus (Counts Three and Four of the Amended Complaint) be and hereby is granted, and this action is dismissed.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

MEHMET SEMIH SIDALI

vs.

IMMIGRATION AND NATURALIZATION SERVICE; et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA COWEN, NYGAARD, ALITO, ROTH, LEWIS,
and MCKEE,
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: June 3, 1997

LD/cc: Sara Criscitelli, Esq.
Su Zann Lamb, Esq.
Michael P. DiRaimondo, Esq.
Thomas E. Moseley, Esq.

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: EXTRADITION OF SIDALI	:	Hon. John J. Hughes
	:	Mag. No. 94-39A
		ORDER
	:	

This court having been advised that the Government of Turkey has withdrawn its request for extradition in this matter

IT IS on this 9th day of May 1997 JH

ORDERED that this matter is discontinued, and the complaint for extradition is dismissed.

/s/ John J. Hughes
JOHN J. HUGHES, U.S.M.J.

FILED

MAY 09 1997

John J. Hughes
U. S. Magistrate Judge

Appendix H

FAITH S. HOCHBERG
United States Attorney
402 East State Street--Room 502
Trenton, New Jersey 08608
(609) 989-0565
AOS-3419

ORIGINAL FILED
MAY 27 1997
WILLIAM T. WALSH, CLERK

RECEIVED
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AT 8:30_____M
WILLIAM T. WALSH
CLERK

MEHMET SEMIH SIDALI, Plaintiff, v. IMMIGRATION & NATURALIZATION SERVICE, *et al.*, Defendants.	:	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY Hon. Maryanne Trump Barry Civil Action No. 95-5665 ***CONSENT ORDER***

The court having been advised that the extradition complaint giving rise to this matter has been dismissed,

IT IS on this 27th day of May, 1997

ORDERED that the conditions of release established by Magistrate Judge John J. Hughes on September 22, 1995, as amended by orders dated September 22, 1995, September 28, 1995, and October 19, 1995, and continued by this Court on January 22, 1996, reimposed by this Court on March 7, 1997, and modified by this Court on May 7, 1997 are hereby revoked, and that Mehmet Semih Sidali is hereby free of all restrictions, and all sureties are hereby discharged.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY, U.S.D.J.

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

Mehmet Semih Sidali

vs.

INS

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 10, 1997.

/s/ Carol Los Mansmann
Circuit Judge

Dated: JUN 17 1997

LD/cc: SC
SZL
MPD
TEM

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

MEHMET SEMIH SIDALI

v.

INS

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 12, 1997.

/s/ Carol Los Mansmann
Circuit Judge

Dated: JUL 29 1997

??/cc: S.C.
SZL
MPD
TEM

Appendix K

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

August 11, 1997

No. *96-5215*

Sidali

v.

INS

Present: MANSMANN, *Circuit Judge.*

Motion by Appellee Mehmet Semih Sidali for further Stay of the Mandate from August 12, 1997 until September 3, 1997.

/s/ Rita Golden
Rita Golden
Deputy Clerk
Direct Dial 597-3080

ORDER

The forgoing motion is/granted. No further extensions, regardless of the reason for the request, will be granted.

By the Court,
/s/ Carol Los Mansmann
Circuit Judge

Dated: AUG 21 1997

??/cc: S.C.
MPD
SZL
TEM

Appendix L

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: EXTRADITION OF SIDALI : Hon. John J. Hughes
: Mag. No. 94-39A
: *MOTION TO DISMISS*

The United States, acting on behalf of the Government of Turkey, hereby moves to dismiss the extradition complaint in this matter. In support this motion, the United States represents that on May 7, 1997, the U.S. Department of Justice received a diplomatic note from the Turkish Embassy indicating that the case against Mehmet Semih Sidali had been dismissed under the statute of limitations, and that the Turkish Government was withdrawing its request for extradition. A copy of this diplomatic note is attached.

Dated: May 8, 1997

FAITH S. HOCHBERG
United States Attorney

By: /s/ Andrew O. Schiff
ANDREW O. SCHIFF
Assistant U.S. Attorney

900-2

The Embassy of the Republic of Turkey presents its compliments to the U.S. Department of State and with reference to Note No. 02.307/1969-776 of December 9, 1993 has the honor to inform the Latter of the decision in the case against Mr. Semih Sidali. The Mersin First High Criminal Court on April 10, 1997, under provisions 1977/80 and 1977/160, decided to abolish the case against Mr. Semih Sidali because the statute of limitations has expired.

The Embassy would like to notify the Department that the court decision was finalized on April 22, 1997. Therefore, the Turkish government is withdrawing its request for the extradition of Mr. Semih Sidali.

The Embassy of the Republic of Turkey avails its of this oppotunity to renew to the U.S. Department of State the assurances of its highest consideration.

May 6, 1997

U.S. Department of State
Washington, D.C.

cc: U.S. Department of Justice
Washington, D.C.

Appendix M

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEHMET SEMIH SIDALI, Petitioner-Appellee v. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES OF AMERICA, WARREN CHRISTOPHER, Secretary of State, CHARLES McNEAL, Acting United States Marshal, Respondents-Appellants	)	C.A. No. 96-5215

GOVERNMENT OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT OR FOR ALTERNATIVE RELIEF

The Immigration and Naturalization Service, et al., Respondents-Appellants, oppose Sidali's motion to dismiss the appeal--decided against Sidali in February 1997--as moot. The basis for Sidali's claim lies in an April 10, 1997, decision by the Mersin (Turkey) High Criminal Court, which stated that the criminal case against Sidali is "dismissed," and an April 14, 1997, letter by the Mersin Court asking the Chief State Prosecutor in Mersin to return the arrest warrant.[1]

---

[1] The documents that Sidali attaches to his motion (Exh. A to his Motion) are not authenticated and do not satisfy minimum admissibility requirements. Cf. Fed. R. Evid. 902(3). Thus, we oppose reliance on these unauthenticated foreign documents that are, additionally, translated by an unidentified person (their Affidavits of Accuracy having failed to certify that the affiant, who is president of the translation company, in fact did these translations).

We are endeavoring to get more information from the Turkish authorities and will advise the Court on the status of the case when we have it.

(Footnote continued)

Sidali's argument to the contrary notwithstanding, the April 10 Mersin Court order and the April 14 letter do not require that the Court vacate its decision.

1. On February 24, 1997, on the government's appeal, this Court reversed the decision of the district court granting Sidali-Is habeas petition for relief from extradition. Sidali filed a petition for rehearing *en banc* on April 10, 45 days after the panel's decision. That same day, the Mersin High Criminal Court held that the statute of limitations expired. Having obtained a Turkish judicial interpretation of Turkish law that could affect his extradition, Sidali now argues that this Court's earlier opinion finding him extraditable under U.S. law should be withdrawn.

We disagree that the extradition case is presently moot[2] The April 10 Mersin Court judgment recites that it is appealable to the Turkish appellate court. The possibility that it will be reversed, particularly in light of the history of prior appellate reversals of Mersin High Criminal Court judgments in this case, must be recognized. Thus, the situation does not meet the Supreme Court's mootness test: the prospect of extradition has not ceased without a reasonable expectation that it will recur, and interim events have not "'completely and irrevocably eradicated the effects'" of the extradition proceeding. *Finberg v.Sullivan*, 658 F.2d 93, 97 (3d Cir. 1981), quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Consequently, Sidali's extraditability remains open and this case is not moot.

That information, however, does not bear on the immediate question before this Court, whether it should now withdraw its opinion.

[2] If the Court dismisses the appeal, as Sidali requests, without also vacating the district court decision, which Sidali does not request, it would leave the government in an untenable position: despite our success on appeal, we would be bound.by that lower court ruling that Sidali cannot be extradited for the rape and murder. Should Sidali's extraditability ultimately not be affected by legal proceedings in Turkey, the extant lower court ruling would bar the government from surrendering him. *See, e.g., Munsingwear v. United* States, 340 U.S. 36 (1950).

In any event, even if the Court were ultimately to conclude that the extradition proceeding is moot, that would not require vacating the Court's February 24 decision. Should the April 10 Mersin Court decision stand, its effect on this proceeding will not have occurred by "happenstance," *see Munsingwear*, 340 U.S. at 40, or due to circumstances "unattributable to any of the parties," *see Karcher v. May*, 484 U.S. 72, 83 (1987), or from the unilateral action of the party who prevailed in the appeal that is now allegedly moot. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1995). It appears instead that Sidali (who did not prevail in the instant appeal) affirmatively sought the Mersin Court ruling unilaterally and without notice of these efforts to this Court or to United States, which represents the Turkish government in the extradition proceeding and also is a party in the habeas action.[3] Those efforts also diminish Sidali's claim to the equitable remedy of dismissal.

Additionally, the case clearly was not moot when the Court decided it; the timing of the change in circumstances *subsequent* to the panel's decision, not while the case was pending on appeal, is a critical factor in the Court's exercise of discretion. See, *e.g., Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 115 (3d Cir. 1996) (when Dr. Humphreys died after court of appeals issued decision in the case but before the mandate issued, the Court balanced the public policy considerations and declined to dismiss his appeal). "The mere fact that [the panel] decided the case against [Sidali] is not a sufficient reason to withdraw [its] opinion." *Id.* at 116.[4] The

---

[3] Sidali's silence was likely predicated on a reasonable assumption that the government would have opposed his two extension requests, moved to expedite the appeal, and sought early issuance of the mandate following the Court's decision to enable Sidali's surrender. We also believe that this Court would have expedited the case and issued its mandate at the time of the decision, had the situation been brought to its attention.

[4] "'Were we to vacate our decision * * * based upon conduct occurring after its issuance, we would be depriving the petitioners of the benefit of an appellate court decision that adjudicated properly presented questions concerning their specific constitutional rights. That alone would give us

(Footnote continued)

Supreme Court similarly has stated that "'judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.111 *U.S. Bancorp*, 513 U.S. at 26-27, quoting *Izumi Seimitsu Koqvo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting).

For all these reasons, Sidali's request that the Court dismiss the government's appeal as moot should be denied.

2. Sidali also requests that, at a minimum, the Court withdraw one footnote in its February 24 decision. Along with every other circuit to have considered the issue, the panel recognized in fn. 7 that the Secretary of State has unreviewable discretion to refuse to extradite on a broad range of factors, and that she--not the courts--has the authority to withhold extradition on humanitarian grounds.[5] The April 10 decision does not invalidate or render moot that observation. Moreover, Sidali's request that this particular footnote be withdrawn shows ultimately that he is concerned less about mootness than about his ability to persist in ligitating the humanitarian issues that this Court held were beyond the district court's reach.

3. Finally, Sidali argues that the April 10 decision provides new and additional factual support for his arguments in his pending rehearing petition or for new claims that he might wish to raise back in the district court. Because the Court has not asked for a response to Sidali's rehearing petition, we do

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considerable pause.'" *Id.* at 116, quoting *Armster v. U.S. District Court*, 806 F.2d 1347, 1355 (9th Cir. 1987).

[5] Sidali suggests (Motion, p. 3) that the Court acted rashly in rejecting the dictum in *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960). However, that same dictum has also been rejected by its own circuit, see *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990), which this Court cited in its analysis. Slip op. 8 n.7.

not address those substantive arguments. See Fed. R. App. P. 35(b).

WHEREFORE, appellants respectfully requests that this Court deny Sidali's motion to vacate its February 24, 1997, decision as moot.

Respectfully submitted,

/s/ Sara Criscitelli
Sara Criscitelli
Criminal Division
U.S. Department of Justice
(202) 514-0040

April 30, 1997

Appendix N

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MEHMET SEMIH SIDALI, Petitioner-Appellee v. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES OF AMERICA, WARREN CHRISTOPHER, Secretary of State, CHARLES McNEAL, Acting United States Marshal, Respondents-Appellants	)	C.A. No. 96-5215

GOVERNMENT SUPPLEMENTAL OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

The Immigration and Naturalization Service, et al., Respondents-Appellants, opposed Sidali's motion.to dismiss the appeal previously decided against him in February 1997. Subsequently, the government moved to dismiss the extradition, having received a diplomatic note from the Government of Turkey withdrawing its extradition request.

Accordingly, we agree that the extradition, and Sidali's petition for rehearing and rehearing en banc, are moot. However, we adhere to our previous argument that the public interest favors denying Sidali's motionto vacate the Court's February 24, 1997, decision.

This case clearly was not moot when the Court decided it; that the change in circumstances occurred after the panel's decision, not while the case was pending on appeal, is a critical factor in the Court's exercise of discretion. *See, e.g., Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 115 (3d Cir. 1996) (when Dr. Humphreys died after court of appeals issued decision in the case but before the mandate

issued, the Court balanced the public policy considerations and declined to dismiss his appeal). Thus, this Court explained in *Humphreys*, "[t]he mere fact that (the panel) decided the case against [Sidali] is not a sufficient reason to withdraw [its] opinion." *Id.* at 116. "'Were we to vacate our decision * * * based upon conduct occurring after its issuance, we would be depriving the petitioners of the benefit of an appellate court decision that adjudicated properly presented questions concerning their specific constitutional rights. That alone would give us considerable pause.'" *Id.*, quoting *Armster v. U.S. District Court*, 806 F.2d 1347, 1355 (9th Cir. 1987).

The Supreme Court similarly has stated that "'judicial. precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 2627 (1995), quoting *Izumi Seimitsu Koqvo Kabushiki Kaisha v. U.S. Phillips Corp.* 510 U.S. 27, 40 (1993) (Stevens, J., dissenting). We would add that this is the first extradition case in the Circuit to expound some basic principles of extradition law.

We also disagree with Sidali's renewed contention that the recent decision of the Mersin court demonstrates that he was not "convicted" under Turkish law. The decision does not hold that there is no final finding of guilt; it merely reiterates what the other documents in the case have consistently adhered to and what this Court recognized, that Sidali was not yet subject to a final conviction because he had not been sentenced.

WHEREFORE, appellants respectfully requests that this Court deny Sidali's motion to vacate its February 24, 1997, decision as moot.

Respectfully submitted,

/s/ Sara Criscitelli
Sara Criscitelli
Criminal Division
U.S. Department of Justice
(202) 514-0040

May 12, 1997

Appendix O

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MEHMET SEMIH SIDALI, Petitioner-Appellee v. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES OF AMERICA, WARREN CHRISTOPHER, Secretary of State, CHARLES McNEAL, Acting United States Marshal, Respondents-Appellants	)	C.A. No. 96-5215

GOVERNMENT OPPOSITION TO APPELLEE'S MOTION TO STAY MANDATE PENDING REHEARING EN BANC OR CERTIORARI PETITION

Sidali moves for a stay of the mandate for 30 days to permit him to seek en banc or Supreme Court review of the order denying his motion to dismiss the already-decided appeal and vacate the Court's decision as moot. The Court did not abuse its discretion in denying the motion, there is virtually no likelihood that the Court en banc or the Supreme Court would reverse that discretion, and Sidali makes no showing that he is harmed by the decision. For these reasons, the Court should deny his request.

1. On February 24, 1997, on the government's appeal, this Court reversed the decision of the district court granting Sidali's habeas petition for relief from extradition to Turkey.

2. Sidali filed a petition for rehearing *en banc* on April 10, 1997, 45 days after the panel's decision. That same day, the Mersin Criminal Court, in Turkey, held that the Turkish statute of limitations expired and that Sidali therefore could not be sentenced for the 1970 rape and murder for which his

extradition had been requested. The Government of Turkey thereafter withdrew the extradition request, and Magistrate Judge Hughes dismissed the pending extradition complaint.

3. Upon receipt of a copy of the Mersin Court's statute of limitations decision, Sidali moved to dismiss this case as moot. The government opposed his motion. The panel denied the motion on May 27, 1997, and on June 3, 1997, the Court denied the petition for rehearing en banc. Judge Becker dissented from the denial of the motion to dismiss but did not dissent from the denial of the rehearing petition.

4. In brief, the factors that we argued in opposition to Sidali's motion to dismiss or that are established by this Court's subsequent denial of rehearing en banc include the following:

* The case was not moot when the Court decided it. Thus, the case presented a case or controversy that, when resolved by the panel, was fully justiciable.[1]

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[1] The timing of the change in circumstances, after the panel issued its opinion and not while the case was pending on appeal, is a critical factor in determining whether to dismiss. Vacatur does not solely implicate Sidali's personal concerns. It also raises the public interest in judicial decisions. Thus, the Supreme Court explained that "'judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26-27 (1995), quoting *Izumi Seimitsu Koqvo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting). This Court agrees. In *Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 115 (3d Cir. 1996), the Court balanced the public policy considerations and declined to dismiss the appeal when Dr. Humphreys died after the Court issued its decision but before the mandate issued. "The mere fact that [the panel] decided the case against Humphreys is not a sufficient reason to withdraw [its] opinion." *Id.* at 116. It added, "'[w]ere we to vacate our decision * * * based upon conduct occurring after its issuance, we would be depriving the petitioners of the benefit of an appellate court decision that adjudicated properly presented questions concerning their specific constitutional rights. That alone would give us considerable

(Footnote continued)

* The decision reversed the flawed judgment of the district court, which itself addressed a number of issues in an extensive published decision. Vacatur by this Court of its decision would have left the district court's extensive habeas opinion standing and thus preserved a legal decision that presented not simply reversible error, but error that in fact was reversed.

* This also is the only published extradition decision in the Third Circuit. As such, it is important precedent within this circuit on basic principles of extradition law that have long been recognized by other courts but were enunciated by this Court only after full briefing and argument in this case.

* The changed circumstances did not deprive Sidali of the opportunity to seek rehearing en banc. Instead, the Court considered and rejected Sidali's petition for rehearing en banc apparently on the merits and without regard for the "mootness" of the appeal. At a minimum, the Government did not argue mootness as a ground for denial of panel or en banc rehearing.

5. There is no reason to believe that the Court's exercise of discretion in declining to order the equitable grant of vacatur presents an issue meriting en banc or Supreme Court review. Sidali's claim that the panel's decision should be vacated because he has been deprived of the opportunity to seek further review implies that rehearing would have been likely or even possible but for dismissal of the underlying extradition complaint. However, this Court denied his petition for rehearing en banc. Nor is there any likelihood that the Supreme Court would have granted a petition for certiorari to review the panel's decision, since it is fully consistent with every other circuit to have reached the issues presented and with prior Supreme Court decisions. In short, the panel's decision--though serving the public interest because it is the first published

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pause.'" *Id.*, quoting *Armster v. U.S. District Court*, 806 F.2d 1347, 1355 (9th Cir. 1987).

decision in this circuit on these issues--is not otherwise remarkable or groundbreaking.

Nor does Sidali allege any en banc or certworthy issue regarding the Court's exercise of discretion in declining to vacate its decision based on subsequent events. Sidali suggests only that vacatur is appropriate when mootness occurs "through happenstance." That is irrelevant, since the event that purportedly mooted his case did not result from happenstance but occurred because of his own litigative efforts in Turkey and his failure to apprise the government of that factor when he delayed the habeas and.appellate process.

6. Finally, Sidali does not assert that issuance of the mandate will make any ultimate difference to him. He suggests only that it is reasonable that he seek this remedy because the extradition case constituted a "harrowing ordeal." Balanced against the value,of the decision to the legal community and the public interest, Sidali's failure to articulate a personal interest sufficient to-justify vacatur defeats his equitable claim to relief.

WHEREFORE, appellants respectfully requests that this Court deny Sidali's motion to stay issuance of the mandate.

Respectfully submitted,

/s/ Sara Criscitelli
Sara Criscitelli
Criminal Division
U.S. Department of Justice
(202) 514-0040

June 10, 1997

Appendix P

PARA PLUS
TRANSLATIONS, INC.

430 Clements Bridge Road
P.O. Box 92
Barrington, NJ 08007
Phone: (609) 547-3695
Fax: (609) 547-3345

AFFIDAVIT OF ACCURACY

STATE OF NEW JERSEY:

SS

COUNTY OF CAMDEN:

This is to certify that the attached translation is an accurate, true and complete rendition INTO English FROM Turkish

OF: Court Degree and letter from Office of Arrestation in Absence in the matter of: MEHMET SEMIH SIDALI

to the best of my knowledge and belief.

PARA-PLUS TRANSLATIONS, INC.

/s/ Sonia M. Santiago
SONIA M. SANTIAGO, PRESIDENT

Sworn and subscribed
before me this 23rd day
of April, 1997.

/s/ Cathie M. Ellis
Notary Public

CATHIE M. ELLIS
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAR. 30, 2002

Every care is taken to ensure the accuracy of all translations. However, Para Plus Translations, Inc., its divisions, affiliates, agents and employees shall not be liable in the event of any claims of error or negligence in translation or typing.

REPUBLIC OF TURKEY
MERSIN

1. Criminal Court

COURT DECREE

Entry No	:1977/80
Adjudication No	:1977/160
State Prosecutor Office Entry No.	:1972/1581
Chief Judge	:Mustafa Unal 20898
Member	:Muharrem Serin 17333
Member	:Necla Kasap 25939
State Prosecutor	:Osman Can 15315
Clerk	:Saliha Kocadag
Plaintiff	:State Prosecution Authorities (Public Prosecution)
Complainant	:Dondu Eskin - From Evcili village, Mersin
Her Attorney	:Mustafa Yonel, Esq.
The slain victim	:Dursun Eskin
Suspect	:Mehmet Sen-Aih Sidali: son of Mehmet and Fatma, born in 1937, registered in the Log book No: 310 of the Vital Statistics bureau of the Mahmudiye District, Mersin, and resides at Kiremithane Mahallesi, 72nd Street, No: 12 in Mersin.
His Attorneys	:Faruk Erem, Esq., Ergun Cosar, Esq.
Offense	:Rape and murder by strangulation
Date of the Offense	:April 18/19, 1970
Date of Arrest	:April 20, 1970
Date of Discharge	:June 22, 1970
Date of Adjudication	:April 10, 1997

The crime, of which the suspect was charged, and whose name is given above, was deliberated in the court, and:

REASONING:

The suspect, whose full identification is given above, was accused of raping and murdering by strangulation the victim Dursun Eskin. A public prosecution proceedings were initiated against him. Following his trial, the accused was acquitted on June 7, 1972. This decision, however, was overturned by the First Court of Appeals. Following a new trial, the lower court found the defendant innocent of all charges, and reaffirmed its initial decision on July 16, 1976.

This decision also was appealed, and it was reversed by the decision dated December 13, 1976, Number: 1976/1-456-517 of the Council of the Court of Appeals for Criminal Cases.

On March 29, 1977, based on the decision of the Court of Appeals reversing the lower court's ruling, it was decided to arrest the suspect in his absentia. After this decision of arrest, no other legal procedure was made to interfere with the statute of limitations, Now, it has been observed that the statute of limitations has expired. Therefore, the court decided to dismiss the case on that basis, and issued the following decision:

ADJUDICATION:
As explained above:

In accordance with the Article: 102/1 of the Turkish Penal Code, based on the statute of limitations, the Public Prosecution case initiated against the suspect has been dismissed.

The decision of arrest in absentia of the suspect has been dropped, and the warrant of arrest in his absentia will be recalled.

The personal effects of the victim, which are under custody, will be kept as evidence.

The suspect will not be charged with the court costs.

In the absence of the complainant and the suspect, and with the presence of the State Prosecutor, this unanimous decision of the court was pronounced to the attorneys of the

complainant as well as of the saspect, and they were advised of their rights to appeal this court decision.

4/10/1997

Chief Judge - 20898 Mustafa Unal (signature)	Member - 17333 Muharrem Serin (signature)	Member - 26939 Neda Kasap (signature)	Clerk S. Kocadag (signature)

TURKISH ORIGINAL OF ABOVE DOCUMENT

Appendix Q

Diplomatic Mission 19

Translations • Interpreting • Language Instruction
222 East 46th Street • 5th Floor • New York, NY 10017
330 East 49th Street New York, NY 10017
Tel: (212) 888-2711, (212) 986-9513 • Fax: (212) 308-7061

ORIGINAL [Seal] (illegible)

CERTIFICATE OF ACCURACY

I, the undersigned, Servet Makooei, residing in the State of York, hereby certify that I have translated from **Turkish** into **English** the following document:

"Extract from Judgment, Final Judgment"

issued to/regarding_____. I further testify that my translation thereof is true, accurate and contains all the information therein according to the best of my knowledge, ability and belief. I am proficient in both the English and Turkish languages. I further certify that I am not related to the person to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof I have duly signed before a notary public of the City of New York this 3rd day of May, 1997.

By: /s/ Y. Mahooei
Translator

State of New York)
) ss.:
County of New York)
Sworn to before me this
3rd day of May, 1997

/s/ Ayse C. Gunduz
Notary Public's signature

ORIGINAL
AYSE C. GUNDUZ,
Notary Public
State of New York,
No. 31-4985324
Qualified in New York
County
Cert. Filed in _____County
Commission Expires
August 17, 1997

[Translation rendered from Turkish into English, re: Extract from a Judgment]

ORIGINAL

[Seal]

Wherefore this judgment consists of one page and is true to the original document, it has not been appealed and is certified to be FINAL [Res Judicata] on April 22, 1997. April 24, 1997.

Court Clerk
/Illegible signature/

Director of the Registrar
/Illegible round stamp/
/Illegible signature/

ORIGINAL

PAGE IN TURKISH

1977/80 Office of Arrestation in Absence

TO THE OFFICE OF THE CHIEF STATE PROSECUTOR
MERSIN

It has been decided to recall the warrant of arrestation in absence issued for the suspect M. Semih Sidali, which is registered in the Entry number 1996/35 of your office; therefore, please return the same without executing it. April 10, 1997

Chief - 20898

Notation (hand-written) 96/35

Mersin Chief State Prosecutor

Please return the communication dated 11/15/91

4/14/97
(signature)

I HEREBY CERTIFY THAT I HAVE TRANSLATED THE ABOVE DOCUMENT FROM TURKISH TO ENGLISH, AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE AND COMPLETE; I FURTHER CERTIFY THAT I AM COMPETENT IN BOTH ENGLISH AND TURKISH TO RENDER SUCH TRANSLATION.

APRIL 21, 1997

AYHAN OZER
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 17, 1999

/s/ Ayhan Ozer

TURKISH ORIGINAL OF ABOVE DOCUMENT

Appendix R

ORIGINAL

Diplomatic Mission 19

ORIGINAL

Translations • Interpreting • Language Instruction
222 East 46th Street • 5th Floor • New York, NY 10017
330 East 49th Street • New York, NY 10017
Tel: (212) 888-2711, (212) 986-9513 • Fax: (212) 308-7061

CERTIFICATE OF ACCURACY

I, the undersigned, Fuat Yalin, residing in the State of New York, hereby certify that I have translated from Turkish into English the following document(s):

"Yilmaz Yonel, Esq., request to Office of the Judge, 1st Criminal Court"

regarding Mehmet Semih Sidali. I further testify that my translation thereof is true, accurate and contains all the information therein according to the best of my knowledge, ability and belief. I am proficient in both the English and Turkish languages. I further certify that I am not related to the person to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof I have duly signed before a notary public of the City of New York this 29th day of April, 1997.

By: /s/ Fuat Yalin
Fuat Yalin, Translator

State of New York)

ORIGINAL

) ss.:

County of New York)
Sworn to before me this
29th day of April, 1997

/s/ Ayse C. Gunduz
Notary Public's signature

AYSE C. GUNDUZ,
Notary Public
State of New York
No. 31-4985324
Qualified in New York County
Cert. Filed in _____County
Commission Expires
August 17, 1997

TURKISH DOCUMENT
(ENGLISH TRANSLATION FOLLOWS)

ATTORNEY
YILMAZ YONEL

Istiklal Cad. 67. Sokak
Kurtulus Ishani 2/4 MERSIN

[Logo for Telephone]
Office: 15002
Home: 234 13

ORIGINAL

DATE 11/5/1993

TO THE OFFICE OF THE JUDGE
1st. CRIMINAL COURT

MERSIN

Docket No.: 1977/80

SUBJECT OF REQUEST: We request that the case is concluded with a conviction.

1. a) Upon the final decision of the Mersin Coroner's Office on 6/8/1971 to investigate the suspect Mehmet Semih Sidali, in accordance with the Article No. 450/9 of the Turkish Criminal Code, a civil law suit had been initiated at your court against the suspect with the claim that the suspect had murdered Dursun Eskin, the daughter of my client.

b) At the conclusion of the hearings on 6/7/1971 and with Decision No. 101/78 your court had decided and ruled that the suspect be acquitted of charges, whereupon we had appealed this decision.

c) On 5/2/1973 and with the court order No. 1491/1699, the Higher Court of Appeals had reversed the decision of acquittal.

d) Upon this reversal of decision, on 7/16/1976 and with Decision No. 103/119 your court had ruled in favor of the reinstatement of decision, whereupon we had appealed this decision.

e) Upon our appeal, the case-file had been sent to the General Council on Penalties of the Higher Court of Appeals,

whereupon, on 12/13/1976 and with court order No. 1-456/517 the General Council on Penalties of the Higher Court of Appeals had reversed the reinstatement decision of your court.

f) After the case-file had been returned by the Higher Court of Appeals, with an approbation order of 3/29/1977 your court had ruled in favor of the apprehension of the suspect in his absence and, on the same date and with the Decision No. 1977/80, had issued a warrant of arrest in the suspect's absence.

II. After having thus summarized the case-file, we hereby submit our request:

According to the Article No. 103 of the Turkish Criminal Code, the legal prescription period commences from the time of commitment of the crime. When the Item regarding the submission of the case is taken into account, the period of prescription concerning the case at hand is 20 years.

According to the Article No. 104 of the Turkish Criminal Code, apprehension or arrest constitutes a factor which suspends [or halts] the period of legal prescription. Since the date of the final decision of apprehension was 3/29/1977, the case at hand will reach the end of its period of legal prescription on 3/30/1997.

[Signature]

[second page of original]

(According to the Article No. 104 of the Turkish Criminal Code, conviction constitutes a factor which suspends [or halts] the period of legal prescription.) If the suspect is convicted, with the application of only one half of the remaining period of legal prescription according to the Article No. 104/2 of the Turkish Criminal Code, the period of legal prescription will expire on 4/19/2000 and during this [remaining] time perhaps the suspect will be apprehended and justice will thus be served.

III. In cases where the Higher Court of Appeals has reversed a decision, if a court summons has not subsequently been served to the suspect and if the suspect has not come to court, according to the Article No. 326/2 of the CMUK, court proceedings can be held and the case concluded in the absence of the suspect.

According to the Item No. 3 of the same Article, courts are under obligation to comply with the decisions of the General Council on Penalties of the Higher Court of Appeals. Therefore, your court is under obligation to comply with a reversal of decision by the General Council on Penalties of the Court of Appeals and has no recourse to decide otherwise on this matter.

IV. Once the conviction decision is reached and made final, then the 30-year period of legal prescription ruled in the Article No. 112/1 of the Turkish Criminal Code will begin to apply, an event which will clearly be highly beneficial from the viewpoint of the preservation of the public and private law and order.

CONCLUSION AND REQUEST:

In view of the circumstances delineated above as supported by the contents of the case-file, as an attorney for the case I respectfully request that by expediently reaching a conviction decision concerning the suspect the period of legal prescription be rendered inapplicable and the penal period of prescription be initiated.

Intervening Attorney
Yilmaz Yonel, Attorney
[Signature]

To the file *[Handwritten]*
11/5/1993
[Illegible]
[Signature]

Appendix S

THE TURKISH CRIMINAL CODE

With an Introduction by

DR. NEVZAT GÜRELLI,
Professor of Law,
University of Istanbul

FRED B. ROTHMAN & CO.
SOUTH HACKENSACK, N.J.

SWEET & MAXWELL LIMITED
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provided that the contrary is not specified in the law or decree regarding the pardon.

102. Except as otherwise prescribed by the law, public prosecution shall be dismissed with the lapse of the following periods:

(1) twenty years in the case of felonies punishable by death or heavy life imprisoment;

(2) fifteen years in the case of felonies punishable by temporary heavy imprisonment for not less than twenty years;

(3) ten years, in the case of felonies punishable by heavy imprisonment for more than five years and less than twenty years or imprisonment for more than five years, or disqualification for life to hold public office;

(4) five years in the case of felonies punishable by heavy imprisonment or imprisoninent or banishment or temporary disqualification to hold public office for not more than five years or by heavy fine;

(5) two years, in the case of offenses punishable by light imprisonment for more than one month or by a light fine of more than thirty liras;

(6) six months, in the case of misdemeanors subject to punishments less than the ones mentioned in the foregoing sub-paragraphs.

The felonies prescribed in Part I of Book Two of this Code which are punishable by death or by imprisonment for life or temporary heavy imprisonment if committed in foreign countries, shall not be subject to the statute of limitations.

103. The statute of limitations begins to run, for offenses which are completed on the date of the perpetration of the criminal act; for felonies attempted or not consummated, on the date of the perpetration of the last felonious act; and for

continuing and successive offenses, on the date the continuation or succession ceases.

104. The statute of limitations for public prosecutions is interrupted upon conviction of the accused, issuance of warrants of seizure or arrest, issuance of a subpoena, upon the questioning of the accused by judicial authorities, rendition of a decision to initiate the final investigation, or the submittal of an indictment by the Public Prosecutor to the court.

Where the statute of limitations is interrupted by one of the above actions, a new period begins to run which is also controlled by another application of the statute of limitations. If there are several reasons which interrupt the running of the statute of limitations the new statute of limitations begins to run on the date of the occurrence of the last reason. However, the said reasons may not extend the statute of limitations more than the period resulting from the addition of one-half of the periods which are respectively prescribed in Article 102.

105. In cases where the statute of limitations is less than a year, any procedural action shall interrupt the running of the statute of limitations.

However, in the case of misdemeanors which are subject to a statute of limitations of less than a year, if a conviction is not rendered within a period of one year, starting from the date the statute of limitations began to run under the provisions of Article 103, the public prosecution shall be dismissed.

106. Actions taken which interrupt the running of the statute of limitations, will also interrupt the running of the statute of limitations for other accomplices against whom no prosecution or investigation has been initiated.

107. Where the initiation of a public prosecution is subject to the obtaining of permission or a decision, or resulting from the resolution of a matter which should be resolved by another authority, the statute of limitations stops running until the permission or decision is obtained or the matter resolved.

108. Where no action is instituted within a six months period for an act which may be proceeded upon only on initiation of a private suit, then a proceeding can never be initiated.

This period starts to run on the day the person entitled to institute suit learns of the actionable act and the perpetrator thereof. However, he may never institute a suit after the period prescribed by the statute of limitations has expired.

If one of the several persons entitled to bring a private suit, fails to do so within six months, the right of the others to bring such a suit will not be lost.

109. Where a person is convicted of an offense and then retried for any reason, being sentenced to a lighter punishment in the

[text ends]

Appendix T

THE TURKISH CODE OF CRIMINAL PROCEDURE

With an Introduction by

DR. FEYYAZ GÖLZÜKLÜ
Docent of Criminal Law Procedure
Political Science Faculty
Ankara University

Introduction translated by

PROFESSOR YILMAZ ALTUG
Docent of Private International Law
Faculty of Law
Istanbul University

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(Procedural Requirements, p. 88)

252. Use of an Interpreter

If the accused does not understand Turkish, an interpreter will inform him of the final accusations and defense of the Public Prosecutor and the defense counsel.

If the accused is deaf or dumb and cannot read, he will be treated according to Article 58.

253. End of Trial and Judgment

The trial is concluded with the issuance of a judgment which either acquits or convicts the accused, discontinues the action, or suspends the trial.

If the offense is a kind which necessitates a complaint and the complainant withdraws his complaint, or if for the public prosecution a permission or decision is necessary, or if the accused is mentally sick, the court may discontinue the action or suspend the trial.

254. Weighing the Evidence

The court weighs the evidence submitted in accordance with its assessment of the investigation and the trial.

255. Authority of Criminal Court Concerning Matters relating to Civil Cases

If the criminal nature of an act depends on a civil case, the judge follows the applicable rules of criminal procedure and evidence and not civil law.

The court may, however, suspend the case or give interested parties an opportunity to institute civil actions.

The court may also await the judgment of the civil court concerning these issues.

During the trial the court will decide the ages of the accused and the injured parties according to the census law.

Decisions of the court concerning such ages may be appealed, together with the decision on the main issue, to a higher court.

256. Number of Votes Necessary for Decision and Judgment

Decisions and judgments are rendered in unanimity or by the majority of the court. Reasons for the dissenting votes must be entered on the record.

CHAPTER 1

GENERAL PROVISIONS

289. Right to Appeal

The right to appeal against judicial decisions is open either to the Public Prosecutor or the accused.

The Public Prosecutor may also appeal on behalf of the accused.

290. Right of Defense Counsel to Appeal

The defense counsel may appeal, provided it is not contrary to the explicit desire of the accused.

291. Right of the Legal Representative and Husband to Appeal

The legal representative of the accused or, if a woman, her husband, may appeal within certain prescribed periods. The same appeal procedure applies whether the appeal is made by the accused or by those qualified to make it on his behalf.

292. Procedure Pertaining to Appeals Made by a Detained Person

The detained person may also appeal by making a declaration to the clerk of the court in the area where he is detained. The court clerk prepares a petition in this respect and submits it to the judge or the presiding judge for approval.

In order to comply with time limitations, petitions should be prepared within the prescribed periods.

293. Error in Making an Appeal

An error made in the course of making an appeal shall not prejudice the rights of the applicant.

294. Result of Public Prosecutor's Appeal

The decision against which an appeal is made by the Public Prosecutor may be reversed or changed in favor of the accused.

* * *

320. Points that will be Reviewed by Court of Appeal

The Court of Appeal is entitled to review on points indicated in the appellate petition and in the appellate brief and, if the appellate request is based on omissions regarding court procedures, on the facts declared in the appellate petition and on other violations of law, even if they are not mentioned in the appeal, which will have a bearing on the judgment.

It is not necessary to indicate new grounds other than those mentioned in paragraph 2 of Article 313 in order to confirm the assertion regarding the appeal.

However, if such grounds are introduced they are accepted.

321. Reversal of the Judgment by the Court of Appeal

The Court of Appeal reverses the judgment to which objection is raised on the points where the law is violated.

If the violation of the law that caused the reversal of the judgment was based on the facts determined as the basis of the judgment, related proceedings are also reversed at the same time.

322. Circumstances in Which Appellate Court will Decide on the Merits of the Case and Correction of Decision

If a judgment was reversed because of a violation of law applied to the facts which were determined as the basis for the judgment, the Court of Appeal in the following situations gives a complete decision on the merits of the case in place of the originating court:

1. If a decision for an acquittal or for the cessation of the investigation is necessary without further clarification of the fact.

2. If the Court of Appeal concurs with the assertion of the Chief Public Prosecutor for the application of the minimum degree of punishment prescribed by law.

3. If the law has been erroneously applied.

4. If the provisions of law regarding court fees and expenses are violated.

In cases other than the above, the Court of Appeal forwards the file to the originating court or to another nearby court of parallel jurisdiction for review of its own decision and for a new judgment.

If the offense involving a punishment is within the jurisdiction of a lower court, the Court of Appeal may transfer the matter to that court.

The Chief Public Prosecutor may protest the decision given by one of the Criminal Departments of the Court of Appeal at the General Criminal Board of Court of Appeal within thirty days after the court decree has been submitted.

The correction procedure against the decision of Criminal Departments or General Criminal Board is possible only in case of omissions, during appellate review, of points specified in an appellate petition, in an appellate brief or in a notification, and of errors which will directly affect the essence of the judgment.

The right to request a correction decision lies with the Chief Public Prosecutor. Upon this request, appellate review is conducted by the department or board which has rendered the decree under consideration. Local Public Prosecutors, on their own motion or upon the request of the parties concerned, draw the attention of the Chief Public Prosecutor to the case and forward the files. If the Public Prosecutor does not consider the request of the parties concerned as requiring

a correction of the decision, he cannot delay the execution of the decree. The Chief Public Prosecutor reviews the matter and if he does not consider the request for correction valid, he orders the execution; otherwise, he orders the suspension of the execution to the Public Prosecutor concerned. He then takes the required measures. If the request for the correction of decision is rejected, a second request for correction cannot be made.

323. To Which Authority Decisions Which have been Reversed for Reasons of Non-Jurisdiction will be Forwarded

If the judgment has been reversed due to the court's unlawfull decision regarding its jurisdiction over the case, the Court of Appeal will submit the case to the court which has primary jurisdiction.

324. Pronouncement of Judgment

Judgment is pronounced in accordance with the provisions of Article 261.

325. Effects of a Reversed Judgment to Other Accused Persons

If the judgment has been reversed in favor of the accused because of the violation of law regarding the application of the punishment, and if the reversed points are applicable to accused persons who have not made a request for appeal, they benefit from the reversal of the judgment just as though they had made a request for appeal.

326. Rights and Responsibilities of the Court Which will Rehear the Case

The courts have the right to insist on their first judgment when their judgment is reversed by the Court of Appeal, but they are obliged thereafter to abide by decisions given by the General Criminal Board of the Court of Appeal.

If the judgment is appealed only by the accused or by the Public Prosecutor on behalf of the accused or by the persons

mentioned in Article 291, the newly passed sentence cannot exceed the sentence set forth in the first judgment.

Appendix U

Professor Dr. Köksal Bayraktar

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April 9, 1997

Thomas E. Moseley, Esq.
One Gateway Center
Newark, New Jersey 07102
USA

BY FAX: 00.1.201.622 8176 AND MAIL

Dear Mr. Moseley,

Re: Sidali Extradition

You may submit this letter which contains the interpretation of Article 126/3 of Turkish Criminal Procedural Law, doctrinal references and the decisions of Court of Appeals to the relevant authorities.

The expert statement of Mr. Turgut Aydin, the Director General of the Foreign Relations of the Ministry of Justice of the Republic of Turkey, in connection with the case at the First High Criminal Court of Mersin is as follows:

"*According to section of 326 of TCCP* (Turkish Criminal Procedural Law) *it is compulsory to abide by the decisions taken by the General General Board of Criminal Panels, meaning that the issue, whether the defendant is guilty of the charge against him, cannot be further discussed. In the case that was sent by the General General Board of Criminal Penals to the Mersin High Criminal Court and being tried under file No. 1977/80, the guilt or innocence of the defendant can*

no longer be debated; but the sentence applicable for the crime which he committed has to be determined".

From your letter dated February 27, 1997 addressed to Mr. Deniz Gökkilic, I understand that, you indicated that the above mentioned statement of Mr. Aydin, the expert of the Ministry of Justice, influenced the relevant American courts and informed us that:

"On February 24, 1997 the Court of Appeals handed down a decision reversing the District Court and concluding that the General Board's decision did convict Mr. Sidali and that he does not face a trial in the Mersin Court on guilt or innocence, but only for sentencing". We have reviewed a copy of this decision.

Against the above decision of Court Appeals of USA and the interpretation of Mr. Turgut Aydin, the response of the Turkish doctrine regarding the application of Article 326/3 of Turkish Criminal Procedural Law is as follows.

1 - The Position of the District Court after the decision of the General General Board of Criminal Penals:

In this respect, Prof. Dr. Erdener Yurtcan, a highly respected and prominent academician in Criminal Procedural Law, in his commentary states that:

"The District Court has to abide with the reversal decision of the General General Board (Article 326/1). It is accepted that; the General General Board which is formed with the participation of the Offices in Criminal Matters that the District Courts should abide with the decisions of this higher General Board, pursuant to the reasons shown in the decision to reverse.

Upon the decision to reverse, the District Court after the trial gives a new final decision and if this decision of the District Court is appealed, the file must be sent to the relevant criminal office of the Court ofAppeals. At this point the main principle is fullfilled. The decisions to abide are examined at the

relevant criminal offices of the Court ofAppeals and the decisions of persistence are examined at the General Board".

In the light of the above evaluation of Prof. Yurtcan, it is determined that decisions to reverse of the General Board reached upon the persistence of the District Courts, mean that the District Court must hold a new trial.

In fact, following the General Board's decision to reverse, the District Courts:

a) must commence (proceed with) the trial again;

b) must hear the accused, the Intervenor and the public prosecutor again;

c) must state that it is proceeding in accordance with the causes for the decision to reverse and abide the decision of the General Board, but;

d) should initiate the trial again.

e) shall collect evidences;

f) shall evaluate and determine on the evidences in favor and against the accused;

g) shall hear and evaluate the point of claim and defense, and finally;

h) shall reach a decision.

Therefore, under Article 326/3 rule "compulsory to abide" mentioned in Article 326/3 means that upon the decision of the General Board the District Court must initiate a new trial.

In fact, under Turkish law, the Court of Appeals shall either approve or reverse any verdict judged by the district courts when appealed, but cannot enter a conviction.

Upon approval the trial shall end.

Upon reversal, the file shall be sent back to the district courts.

In this case, the district courts shall either abide or persist. In other words the district courts shall decide either of abidance or persistence.

In both cases, the district courts have to recommence the trial. In practice, this state is called "decision of action" that is "a decision reached upon the recommencing of the trial".

The decision to abide is sent to the relevant criminal office of the Court of Appeals, and the decision of persistence is sent to the General Board.

The relevant criminal office of the Court of Appeals, may either approve or reverse the decision of the district courts. In case of approval the decision is final and thus the trial shall end. In case of reversal, the file shall be sent back to the district court and the trial shall recommence as explained above.

Similarly, the decision of persistence when sent back by the district court to the General Board, the General Board may decide to approve or reverse this decision. In case of approval the trial shall end. In case of reversal the file shall be sent back to the district courts. Now, in our case, the issue to be examined and discussed lies in this point; the General Board has reversed the decision of persistence of the District Court.

We have to mention again that, upon the General Board's decision to reverse, the District Court shall recommence with the trial and fulfill all the proceedings stated in paragraphs (a) to (h).

In other words, the district courts, upon the decision to reverse shall recommence with the trial (this means "to abide") and shall continue with the trial under the principle of liberty.

In this respect. Prof. Yurtcan, in the commentary of Turkish Criminal Procedural Law (volume III, 2nd edition,1995, page 251) writes as follows:

"This rule and principle may be considered as the result of the loss of validity of the previous final decision of the Court after the abidance. When the previous decision loses its

validity a new judicial examination has to be made. The purpose of this judicial examination may be considered to be somewhat different from the one of the first trial, since to correct the unlawfulness stated in the decision of the Court of Appeals is the purpose besides the purpose of deciding in accordance with the truth. It can be stated that this judicial examination is easier than the one of the first trial, especially when the inspection of the Court of Appeals has been fully realized and the all the failing parts of the previous decision have been stated in the decision of the Court of Appeals.

However, the court may reach the same results upon the judicial examination it has made after the decision to abide. The decision to abide is to start a new judicial examination after accepting the unlawful parts in the previous decision. However, the previous results may be reached after the new examination. This situation must not be confused with a decision of persistence on the previous decision. In the case of persistence the Court has not accepted the unlawful parts stated in the decision of the Court of Appeals and is insisting that it's decision is indeed lawful, and therefore is not conducting another judicial examination.

Therefore, the following conclusion may be reached upon the determination of the above mentioned issues.

The High Criminal Court of Mersin shall initiate a new trial by abiding with the decision to reverse of the General Board. The meaning of the term "to abide is obligatory" stipulated in Article 326/3 of the Criminal Procedure Law must be understood in the light of these explanations.

The decision to abide of the district courts means to be able to conduct the new judicial examination freely. Thus, the whole judicial procedure shall commence again. Consequently the decision reached at the end of the new trial shall again be subject to the inspection of the Court of Appeals and will become final with the decision of approval.

Therefore, the interpretation indicating that "the High Criminal Court of Mersin can only decide on the penalty" is wrong.

Instead, the High Criminal Court of Mersin must conduct a new trial on guilt or innocence.

II. The Turkish legal practice within the decisions of the Court of Appeals, shows that the district courts have reached to new decisions in the trials conducted after the decision to reverse of the Board.

The General Board in its decision dated 11.5.1987 and numbered E.1987/6-156/K.1987/271 has stated that ". . .*since the decision reached by the District Court after the decision to reverse is not the same as the one before, it shall not constitute a decision of persistence. The request of appeal should be investigated by the relevant office of the Court of Appeals.*" (see Yurtcan. pg. 265)

Another important decision of the General Board dated 15.3.1991 and numbered 5-42/61 states that *"the decision of the General Board is a decision to reverse. Therefore, the persistence is no longer valid. The district court is free to reach a new and different verdict"*

The following decision of the General General Board dated 25.5.1992 and numbered 9-145/170 has the same content as the ones mentioned above:

According to the file reviewed:

The decision of persistence dated 12.11.1991 and numbered 794/1016 of the District Court has been reversed by the General Board for the reason that the accused was not given a chance to make a statement relating to the unfavorable decision to reverse and that this situation which was against the Criminal Procedural Law.

Accordingly the District Court has abided with the decision to reverse of the General Board and has reached a new decision of acquittal stating that the crime has not been established by evidence.

According to the consisted opinions of the General Board, the decision of the General Board is a decision of reversal.

Therefore, the decision of persistence is no longer valid. The District Court is free to reach a new and different decision. Thus, in accordance with the reason of the reversal decision of the General Board a new decision has been reached. The procedural law does not permit this new decision to be reviewed by the General Board before the review of the Office of the Court of Appeals.

The opinion of the Court of Appeals is clear, and it is not possible to share an opinion indicating that another review has no purpose but to prolong the trial, because, although the Office of the Court of Appeals may be of a different opinion, the obligatory provisions of the Criminal Procedural Law can not be disregarded for the sole purpose of not prolonging the trial.

For these reasons, it should be decided that the review should be made by the relevant Office of the Court of Appeals.

Conclusion: For the reasons stated above, it has been unanimously decided on 15.3.1993 that the last decision of the District Court is not a decision of persistence in principle, but is a new decision, and that the review of appeal should be made by the 5th Office of the Court of Appeals, and that the file should be sent to the Head Attorney of State's Office to be sent to the Office stated above.

Another decision of the General Board dated 25.5.1992 is as follows:

The decision of the General Board is a decision of reversal. Therefore the decision of persistence is no longer validly existing. The District Court is free to reach a new and different decision. Thus, in accordance with the reasons stated in the reversal decision of the General Board a new decision has been reached. This new decision, which is not decision of persistence according to the law, must be reviewed by the Office of the Court of Appeals. If the contrary is done, then before the Office of the Court of Appeals the General Board would have to review the decision, which would be clearly against procedural law.

The opinion of the Court of Appeals is clear, and it is not possible to assert an opinion indicating that another review has no purpose but to prolong the trial, because, although the Office of the Court of Appeals may be of a different opinion, the obligatory provisions of the Criminal Procedural Law can not be disregarded for the sole purpose of not prolonging the trial. The practice of the General Board is undoubtedly in accordance with the opinion stated above.

For this reason, it should be decided for the decision of the District Court, which is a new decision, to be reviewed by the Office of the Court of Appeals.

Conclusion: For the reasons stated it has been unanimously decided on 25.5.1992 for the file to be sent to the relevant Office of the Court of Appeals for review.

As explained above, according to the Turkish Criminal Procedural Law, the trial procedures will continue until the Court of Appeals s approves the decision of the District Court. The Court of Appeals should make its examination only on over the principles of law and should not evaluate the physical facts of the case. Therefore, the General Board decision on the Semih Sidali case is at fault on this point, since it has declared opinions on the physical facts of the case.

It is natural that the decision of the District Court will be on the innocence or guilt of the accused no matter how many times it's decisions have been reviewed by the Court of Appeals. The decision of acquittal or conviction can only be rendered by the District Court as it is not a automaton deciding only on the amount of the penalty.

The Court of Appeals can never give decisions as such. If the contrary is accepted, it shall result in the dependence of the Judge and shall hinder his freedom in rendering decision. This consequence can never be approved.

I hope the above information shall shed light on the situation of Mr. Semih Sidali.

Executed on April 9, 1997

/s/ Köksal Bayraktar

Prof. Dr. Köksal Bayraktar

Appendix V

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
1886 Greentree Road
Cherry Hill, New Jersey 08003

Refer To This File #: A90 659 556

Date: AUG 25 1997

Mehmet Semih Sidali
777 West State Street
Trenton, New Jersey 08618

Dear Mr. Sidali:

Please take notice that this Service intends to deny your application for naturalization to United States citizenship.

Section 101(a)(43)(A) of the INA defines "murder, rape, or sexual abuse of a minor" as "aggravated felony". This section of the Act attaches retroactively to convictions occurring before, on or after November 18, 1988.

Section 101(a)(8) of the INA, as amended September 30, 1996, reiterates that "one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43))" is not a person of good moral character.

Section 316(a)(3) of the INA states that no person shall be naturalized unless he "has been and still is a person of good moral character".

You were interviewed on April 7, 1997. Since then the Examinations Branch has learned of the decision rendered, December 10, 1996, in *Mehmet Semih Sidali v. INS*, 1997 WL 74506 (3rd Cir.(N.J.)), in which it was determined that the General Board in Turkey had convicted you of rape and murder.

You are accorded fifteen days from the date of this notice to offer evidence in support of your naturalization application and in opposition to the denial.

Sincerely yours,

/s/ Andrea J. Quarantillo
Andrea J. Quarantillo
District Director

cc: Michael P. DiRaimondo, Esq.
One Rockefeller Plaza, Suite 1406
New York, New York 10020

Appendix W

Report

Upon the examination conducted naked of Semih Sidali by me: He is 5 ft. 7 in. tall, fleshy, white skinned, age 32-33, 187 lbs. No trace of scratch was observed in his hands, neck, face and body, as well as in the area surrounding the penis that could suggest having been caused by a struggle or fight. April 19, 1970

State Medical Doctor
Ilhan Tanju, M.D.

To the Office of the Supreme Court of Appeals
Office of the First Presidency

AUTOPSY REPORT

Dursun Eskin's corpse was sent to the cemetery for necessary autopsy. After making a break between 13:00 P.M. and 14:00 P.M,Dr.Ilh Tanju, the administrative medical doctor,and Niyazi Apak, the clerk of the court, went to the cemetery by the car of police.

The doctor began the autopsy, and Ziya Kendir the "imam" of the cemetery, assisted him.

Dr. Ilhan Tunju was reminded his swear, and he followed the technique of autopsy,and opened the head, chest and stomach were cut open

1- When the head was cut open, nothing wrong with the brai n was seen.

2- When the chest was cut open, the lungs and heart were taken Lungs were put in a bucketfull of water. They floated at thh surface the water. When the corpse had been examined in the house, being pressed on the chest,food and water had come out through the nostrils,for the mouth was close. The lungs were cut,and some food and water were seen in them.The heartwas found normal.A little blood was taken out of the heart and put in a small bottle which was brought. The liver, spleen and kidneys were normal, too.

3- The stomach was cut open.The stomach and and intestines wer normal, but the stomach was a bit swollen.A little mixture of food and water was put in a bottle.

The organ of generation was reexamined.As it was already mentied, it was tom at the membrane, and it was bloody.Out of it,it was tor about 3 or 4 mm., and it was new.No semen was found at the organ.The t of the organ was pressed on, and some dirty red liquid came out.

Reason of death: "As the result of autopsy,

I think that the person died, being suffocated.Some food from the stomach went to the lungs,and a woman's belt which tightened the neck,suffocated the person.Pieces of cotton

plugged into the nostrils might have been done so to make the murdering easy."

RESULT. "The girl was raped and then murdered being suffocated But, I think, she was probably made eat and drink-something before being raped," he said.Because there was nothing left to do with the corpse, it was sewed and it was allowed to be buried.Then this report was signed. April 18, 1970

Mahmut Bilgin Assistant Public Prosecutor	Niyazi Apak Secretary	Dr. Ilhan Tanju Administrative Medical Doctor	Ziya Kendir Assistant in Autops

This is to certify that this copy of report is as same as the original copy.March 30, 1981

Secretary (Signature)	Official Seal	Secretary in chief (Signature)

16-17

Report of corpse Examination and Investigation

Today,at 8;45A.M., after receiving the telephone call from th police station at market place and being informed about the murder of a 15-year-old girl, who was found dead being suffocated,who stayed at Semih Sidali's house on Kuvayi Milliye street, Osmaniye District, and the necessary precautions taken, the group, including Dr. Ilhan Tanju the adinistrative medical doctor, Niyazi Apak, the clerk of the court, and Isz Bilgn, the policeman from the technical bureau, came by a car of direct rate of Health, at 9:00 A.M.,to the house where the case took place.

The house is at Osmahiyeon the way to gözhe, ahead of the mosque recently built. It is on the left side, surrounded by a garden.It is a two storey house. There are there steps leading to the first floor.Th are stairs separately in the northern part,leading to the second floo The corpse was downstairs.When the group came into the garden through the iron gate it entered downstairs through the door in the north-easern part of the building.Then they we nt to the entry.They saw the palor on the left, a room whichwas separatedfrom from by a glass dividin wall.They alsosaw a corridor leading to the bathroo m, a bedroom on th right and a room on the left which had a window in the west and another window in the south.The corpse was in this room.

On the side of the room, in which there was the corpse, there was a kitchen, too.

The room in which the corpse was entered.Right on the righ side,there was a "Vezüv"stove with a portable radio on it .There was divan after the stove.There were, on the divan, three pillows, two of them against the wall, and the third, on the divan, near the stove, a key, a pu a reel of white thread, scissors and dresses being sewed for small girls.In the north corner of the room, there was a bed made of wood. On the bed, there was a corpse, it mouth covered with its hair. Its right arm spread out outside; between the two divans there

was a small chair, a night gown on it, and under the night-gown a "savan", a lig Turkish rug.The head of the corpse was towards the west. On the other side of the bed, there was a chair with a pair of white socks on it.Right at this end of the divan, there was a block of soap in a piece of cloth under-neath.There was a single slipper,anempty bag, Plastic toys,and a okastuc okate if a child. The quilt covering the corpse was removed.The quilt was of the same clot and colour inside and outside.Black nylon drawers were extending down the groin of the corpse. The brassiere was pulled upward.The open hand was on the belly.A green sweater was on a right under the sweater was a short couloured blouse which was pulled upward .The blouse wa wet.Right around the neck there was a blue cloth belt with a buckle which had tightened it.There were rings at the ears hair was braided, and several pimples were seen on the left cheek

There was a big blood spot between the black pair of draw-ers led down to the hips and the back of the corpse.The face of the crop was toward the south.Both of the knees were-pulled upward.The body lay the bed on its back.There was a pillow underthe head.The pink under ar was pulled right above the belly.

At That moment,mother of mine,the murdered girl, came froom Ki ilbag and was let intothe room.

Then the clothes were taken off the corpse.

After that the identity book of the dead girl was pre-sented.Her Being Dursun Eskin or the name in the old days Mine Eskin, registration at 23, Evcili village, Gözne subdis-trict,daughter of Döndü,Ibrahim's daughter, birth date March 8,1955, and the identity book which was given to her by Mersin Registry of Births were seen and read, and then it was athed to the report.

The thick cloth belt around the neck was cut off.The draw-ers under the black pants were black, too, The red and yellow blouse was revled under the shoulders.The outer examination showed that the corpse was of an individual who was about at

the age of 16,5 ft-and 2 in tall, brunette and light-brown haired.There was hair at the organ of generation.The nostrils were plugged with some cotton.On the left of the neck, about 4 cm under the ear, because of the tightening of the belt-buckle, Thre was a 6 cm scar and some other scars under the chin,near the neck. Right on the left shoulder and on the arm, there were 3 bruises.When the pieces of cotton were removed off the nostrilsand the chest wa s slightly pressed on, come watery food came out.On the right of the neck, there were scars because of the neck being tightened There wer bruises one as large as the palm near the organ of generation because of being teased about.There were bolld spots at the drawers and bed sh hear the organ of generation.The right of the face was purplish.It was purple at the back and belly of the body because of being dead. The corpse was dead solid. There was no other symptoms at the corpse.The bed sh was torn in the middle.

Dr. Ilhan Tanju, the administrative medical doctor, after swearing was asked to give his medical opinions about the reason of death.

"The corpse is a 15 or 16-year-old individual's corpse.Brunette, long haired,5ft,and 2 in tall,60 kilos.Eyes are close and the mouth is a little open.When the cotton pieces were taken out of the nostrils and the chest pressed on, considerable amount of food and water came out through the nostrils.There arebruises on the left shoulder and arm, and a scar about 1 cm in diametter.Under the left ear there was a 6 of 7 line because of the belt buckle.There were several lines because of the same object in front part of the neck and several lines at the right arm The face had turned purple.The organ of generation is haired.Some blood has come out from the vulva to the drawers and bedsheet.

When the organ of generation was examined it was seen that the virginity was gone and the membrane had been torn, and it had happened in one day by the most.The blood spots in the bed had clotted."

Autopsy was necessary to determine the reason of death. "Let's take the corpse to the cemetery for autopsy," he said.....

Necessary investigation in the house was made to find anything as the evidence about the crome. A piece of cloth and a yellow sponge glove for rubbing the body with blood spurts andn Semih Sidali's qyjama shitt, for there was a spot on its left sleeve, were taken.At present,because al the procedures had been done in the house, the report which was written w signed.April 18,1970

Mähmut Bilgin Assistant Public Prosecutor	Niyazi Apak Secretary	Dr. Ilhan Tahju Administrative Medical Doctor	Döndü Eskin Identification Witness

Osman Özyilmaz
Chief of 2nd Section of police

Süleyman Toksoy
Plain-clothes policeman

This is to certify that this copy of report is as same as the orginal copy.March 30,1981

(Official Seal)

Secretary
(Signature)

Secretary in chief
(Signature)

The only statements that correspond to the time of offense are the statements given by Fatma SIDALI, mother of the accused, and Ayse CETINSOY; even one may think that the statements of these two witnesses may not be impartial and it may cause some disturbance that these witnesses are the relatives of the accused, it is a necessity to take the statements of these two witnesses esssential in evalautaion of the evidences and it is a must to consider the offense took place as those two witnesses describe. The first thing to take into account is that these two witnesses have certainly stated that the watchdog has barked that particular night. As it is impossible for the dog to bark at the accused, the first conclusion to be drawn out is that someone, that is to say a stranger, has entered the garden thus the house that night.

[continuation from previous transcript page]

at this point, Your Honor.

THE COURT: Any objection?

MR. SCHIFF: No, Your Honor.

THE COURT: In evidence, R-33.

BY MR. DiRAIMONDO:

Q Now, was this a one or two family home?

A It's a two family home.

Q And, do you know the address?

A I believe the name of the street is (indiscernible) Street, and I believe the number was 45 or something like that.

Q Okay. Who lived there with you?

A My wife, we had two kids at that time, Fatma and Mel and my parents.

Q Okay. Who lived downstairs?

A We lived downstairs and my parents lived upstairs, but there was no distinction upstairs, downstairs, this was one family living together, two family living together.

Q Okay. How many acres of land was the property on?

A The property, 120 acres, but not all of them was ours, only three acres was ours, the rest was my uncles.

Q Was . that adjoining property to this? Was that adjacent to it?

A Yeah. The orange grove, there's no building whatsoever next to this house. The nearest one, maybe a mile away, I don't know.

Q There was an issue, Mr. Sidali, over your pajama top. Were you wearing those pajamas on that evening?

A Yes, yes, same pajamas, yeah.

Q The issue concerned a blood stain on the shoulder of the pajama top.

A Yeah.

Q Could you tell the Court why or how to your best recollection that blood stain occurred on the pajama top?

A Okay. The day my wife and my father and daughter left for Ankora, same morning, then my wife was folding my pajamas, I (indiscernible) in a place where I couldn't see, somewhere, just smaller than the tip of a match and she said, you must have killed a mosquito last night and she also showed me our bed sheet because when you -- if the mosquito has bitten you in the bed, the same kind of stain and same size should be the other side, too. So, I'm (indiscernible) that day and she showed me that and she showed me both of them. So, since she was going, she didn't, I believe, put it in the laundry bag whatever and she folded and put it on our bed again. That night I came and I put the same -- it wasn't dirty, just a little bit red stuff.

Q All right. Are mosquitoes common in Mersen?

A Yeah, very common. Mersen is a very hot region, just like Florida and it's a farming town and you use (indiscernible) watering the your vegetables or orange groves, plenty of office there was a butcher, meat shop, you know, I knew he had posted some numbers on his wall, like policeman number, police station number, ambulance number, hospital, so I remembered that he had those numbers posted up right there and since I knew his number, that number was in my mind, I called him right away instead of going to telephone book. I said to him, this girl, you know, is killed and please look

up the phone number and dial them and give my address so they could send somebody over.

Q And, did the police come at that point in time?

A No, after I hung up the telephone, I said I'm not going to, wait any more. I got out to the street, looking because between my house and the station is no more than half a mile. So, what did you do?

A Same -- on the same street. So, maybe I waited about two minutes or whatever and since I didn't see anybody coming, I got in the car and I knew the police department had very few vehicles, they weren't motorized at all. So, I said, let me -get me in the car, go to the station and instead of them walking to me, let me get them home. So, when -- between police station and my house, there was a hospital and right on the sidewalk I saw these two security guards walking, so I said, maybe my parents called them up, you know, and these are the guards. So, I stopped, I asked them where they were going, they said, we are going to Sidali's house- I said, I'm Sidali, come in and I'll take you there. So, we came, all three of us together to the home. I showed them where the girl was.

Q So, you brought them in you car to your house?

A Yes, yes.

Q Okay. And, when you entered the house, you went where?

A I went to the living room, I didn't want to go to the area any more, you know, it was scary and I kept sitting on the chair.

Q And, where were your mother and aunt at this point in time?

A They were with me, too.

Q Okay. And what did the security guards do?

A One of them stood in, I believe, he stood in front of the door where the girl was murdered and the other one said, I don't know why he didn't use the phone, he said, let me go and tell the chief. And he left.

Q Okay. Did anybody else from the Turkish authorities come to the house after that?

A After 20 minutes or so, the house was filled with police and prosecutor and the state medical doctor.

Q Did the prosecutor say anything to you when he arrived?

A As soon as he walk in, and he introduce himself to me and I did to him, he said, I'm the prosecutor and his first question was, he came in a police car, the first thing he asked me, could it be you, sir, who has done this. I said, hell, no. I am not -- and he kept asking the same question, two, three times, I said, and I knew the gentleman who was with him, the medical state doctor, I said, here is your doctor, examine my y. If I have done this thing, you'll see something on me they agreed. We went together to my bedroom.

Q That's the master bedroom?

A Yeah.

Q Who went into the master bedroom?

A I believe two, three detective and prosecutor, medical doctor and me.

Q And, what happened?

A And, then I stripped, I took everything off and the doctor k at it, he says, I could not see anything and he made out he report that he put in the file.

Q Did they find anything on you, did they find scratches?

A They looked for hair, nothing, no.

Q Did they find blood, anything of that nature?

A That time when they were -- the doctor was examining me, that's when the found the pajama top and one of the detectives as going through my pajamas and he says, that's how it happened, you know, and they got the pajamas, but not the bed linen.

Q Now, you said they were looking for hair, were they looking for hair on --

A Yeah, at that time, I heard them, the detective, the magnifier in their hand and they were searching for hairs on the bed, or on the body and I heard them, there was no hair whatsoever. And, I have, you know, my body is quite hairy. There was no hair whatsoever.

Q Did you have any bruises on you at all?

A No, no bruises.

Q Now, did they estimate the time of Mina's death that evening?

A When I read that sloppy autopsy report, I didn't see the doctor putting any time at all. Doctor -- I believe the tribunal judges, because they are trying too many murder cases and they put down the girl was dead between six or eight hours that I made the call in, before I put the call to my friend, the prosecutor's place.

Q So, what time would that have been the evening before?

A So, you figure it out. I was calling them like between 7:30 and quarter to eight and if you deduct eight hours, maybe one o'clock, two o'clock in the morning that it must have happened.

Q Where were you at one or two o'clock in the morning?

A I was upstairs sleeping.

Q Did you return downstairs at all during the middle of the night?

A No.

Q There was an autopsy done on Mina?

A Yeah.

Q Where was that done, do you know?

A I didn't know until late, then I got these documents from Turkey to Union County jail. When I was looking, I was surprised that they did the autopsy in the cemetery.

Q Is that customary?

A I don't -- I don't know. It's very unusual to take a dead body to the cemetery and the doctors helper was a preacher, instead of nurses or whatever, he had the preacher put on a mask and to help him out. If you read the autopsy report, it's just shameful.

Q Okay. Did they find any fingerprints at the scene of the crime?

A I believe outside the balcony where that door was broken, they found three burnt matches and I don't smoke. I never carry matches on me.

Q How about fingerprints, did they look for fingerprints on the door?

A Yeah, they were looking for fingerprints when I was sitting on the chair inside the living room. I heard this guy, expert in police, saying there was more than one fingerprints on the handle, so he says, I couldn't get a good reading. So, I told him, I touched the handle to see whether the door was locked, closed, locked or not. If the door was locked, it wasn't unlocked, maybe I would tell her open it up, you know, but it

Q Did you get your medication at all that day, Sam?

A Night time, she -- nurse came up and because officer who took me up saw that I was real sick and I thought I was having heart attack, she called the nurse right away,

Mr. Sidali doesn't look right to me and they gave -- yeah, they brought the medication.

Q How did you feel when you returned back to Union County jail?

A I thought I was really dying because it was very hard to carry those heavy load with your hands and ankles cuffed, you know.

Q You took all your entire belongings, Sam?

A Yes.

Q Sam, have you ever committed a crime of violence in your life?

A Never, never have.

Q Sam, I have one final question for you. Did you commit this crime on April 17, 1970?

A No, sir. I am not a sick person. No, I didn't, that's the end of it.

Q Do you have anything to add, Sam?

THE COURT: No -- I'll sustain the objection to that.

MR. DiRAIMONDO: Thank you.

THE COURT: Mr. DiRaimondo, what's the condition for which Mr. Sidali takes the medication and what is the [text cut off]

Q And, did you point this to his attention?

A Yes, I did because I found the same type of spot on the bed sheet and I made a comment to the effect that, I said, you must have crushed a very large mosquito.

Q How large was the blood stain?

A Perhaps the size of a lentil.

Q And where on the pajama top was the stain located?

A on the shoulder.

Q And, what date was this, that this occurred?

A This happened on the very same morning, on 17th of April when we were heading to Ankora that day.

Q Are there a lot of mosquitoes in Mersen?

A Yes, there are lots of mosquitoes in Mersen because Mersen possesses a very hot climate.

Q Now, I also understand that they found a belt at the scene of the crime.

A Yes.

Q Whose belt was this?

A It was the belt of my old coat.

Q And why was it in Mina's room?

A I wasn't using this belt and this belt was previously in the toy basket that belonged to my children and it was discarded in the toy basket and that toy basket happened to be in Mina's room.

Q Who, if any of your children used this belt, if you know?

A My son was very fond of that belt because he used to drag some of the toys with that belt. He used it as a tow line.

Q While in the United States did you and Sam ever go to the Turkish Consulate to renew your passports or extend your Turkish passports?

A Yes, we did.

Q How many times, approximately?

A For passports, maybe seven or eight times.

Q And, did you always give your current U.S. address to the Turkish Consulate?

A Yes, we did.

Q Did you ever try to hide your whereabouts in the United States from the Turkish authorities?

A Never.

Q Were you and Sam invited to the Turkish Consulate to functions while you lived in the United States?

A Yes, we were invited.

Q Were you on their mailing list?

A Yes, we were.

Q And, when did you first start receiving invitations from the Consulate?

MRS. SIDALL I don't remember, pardon.

MR. DiRAIMONDO: Okay.

THE INTERPRETER: I don't remember exactly, but I would say 1980 to 1981.

BY MR. DiRAIMONDO:

Q That's fine. Did any of your children attend classes at the Consulate?

A Yes. My youngest daughter attended school at the Consulate for one year.

Q What's your youngest daughter's name?

MRS. SIDALL: Asha (indiscernible) Sidali.

THE INTERPRETER: Asha (indiscernible) Sidali.

BY MR. DiRAIMONDO:

Q And, did she receive a diploma or certificate for that?

A Yes, she did.

MR. DiRAIMONDO: I have no further questions, Your Honor.

THE COURT: Thank you. Any questions, Mr. Schiff?

MR. SCHIFF: No, Your Honor.

THE COURT: You may step down. Thank you Mrs. Sidali.

MR. DiRAIMONDO: Your Honor, one other matter.

THE COURT: Before we go into that, do we need the interpreter any more?

MR. DiRAIMONDO: No, Your Honor.

THE COURT: All right, thank you very much. You did a fine job.

MR. DiRAIMONDO: Thank you.

THE COURT: You're free to go. Yes, sir?

MR. DiRAIMONDO: Your Honor, we have the son Mustafa, Mel, Sidali, in the courtroom today and I'd like to just present him, not for testimony, but just to show that the scar from when he fell on his head two days prior to this incident, is still on his forehead.

THE COURT: I believe you.

MR. DiRAIMONDO: Thank you.

THE COURT: Can we adjourn now, Mr. DiRaimondo and we have Dr. Adler, is it?

MR. DiRAIMONDO: Yes, Your Honor.

THE COURT: Why don't we reconvene at ten minutes to two and we'll start with Dr. Adler.

MR. DiRAIMONDO: Thank you, Your Honor.

THE COURT: Thank you.

MR. GLYNN: All rise.

(LUNCHEON RECESS)

THE COURT: Mr. DiRaimondo, you have a witness?

MR. DiRAIMONDO: Yes, Your Honor. I'd like to call, Dr. Scott Adler, please.

MR. GLYNN: Right up here, sir. Please raise your right hand, place your left hand on the Bible.

SCOTT B. ADLER, RESPONDENT'S WITNESS, SWORN:

MR. GLYNN: And spell your last name please.

THE WITNESS: A-D-L-E-R.

THE COURT: Go ahead, Mr. DiRaimondo.

MR. DiRAIMONDO: Thank you, Your Honor.

constipation, rectal bleeding can be, you know, anything from hemorrhoids to anything as serious as colon cancer, which certainly needed to be evaluated. His chest pain was really quite a bit concerning and may have indicated coronary artery disease which certainly would

need to be evaluated as well. He had one severe episode, I guess a couple months before I had seen him and had several episodes since then.

The problem that he had with the symptoms of tingling, weakness in his arms, in his face and his leg certainly might have been indicative of a small stroke or what's called a TIA and then the last problem, the problem with urination, you know, in a man close to 60, one has to think about prostate problems and each and every one of these problems, you know, could potentially be very serious.

Q Could you adequately examine him at the marshal's lock-up on that day?

A It was a completely inadequate examination.

Q Did you recommend any testing that should be done for him?

A Yes, I did. I recommended some basic testing. I mentioned the possibility of his having at least a sigmoidoscopy, or a colonoscopy, which is looking into the colon to see if there is any signs or sources of the bleeding or signs of tumors.

I suggested the possibility of a stress test to evaluate his chest pain. Other problems in terms of neurologic evaluation to check the circulation in his carotid arteries and the arteries of his brain, including a CAT Scan of his head to also make sure that he did or did not have any signs of a TIA or circulatory problems to his brain, and lastly, further evaluation of his urinary symptoms, including blood testing and an adequate rectal examination.

Q Could any of these ailments or problems alone be life threatening to Mr. Sidali?

A Yes, they could.

Q Did you get an opportunity to review the physician's report of September 13, '95 which is marked as Defendant's Exhibit 5-35, I show it to you now?

A Yes, I did.

Q And, do you have an opinion as to whether or not that examination on September 13th by the Goverment's physician was adequate or inadequate?

A I think it was inadequate. The only thing that was adequate in it was that the rectal exam was done and his prostate was not apparently enlarged. But other than that, there was really no information in that examination that would give any further information about any of the other problems.

Q And, nothing in that that dealt with any of the things that you pointed out in your report of August 3rd?

A He said there was no blood in the stool at that time, but one episode, one sample doesn't mean anything.

MR. DiRAIMONDO: I'd like to move that into evidence at this point, Your Honor.

THE COURT: S-35. Would you identify this, am I in receipt of this or not? Can I see it? You're familiar with his, Mr. Schiff?

MR. SCHIFF: Yeah, but I don't seem to have a copy. Is it a handwritten report?

MR. DiRAIMONDO: Yes.

THE COURT: Yes.

MR. SCHIFF: Yes, I've seen it before.

THE COURT: I don't -- I have not received this before. Do you have any objection to it, Mr. Schiff?

MR. SCHIFF: No, Your Honor.

THE COURT: Just give me a moment.

MR. DiRAIMONDO: Sure, Your Honor.

THE COURT: S-35 in evidence. Go ahead.

BY MR. DiRAIMONDO:

Q Do you have any opinion, Doctor, as to what Mr. Sidali's continued incarceration could mean to his health?

A I think it's undoubtedly going to contribute to his decline.

MR. DiRAIMONDO: I have no further questions, Your Honor.

THE COURT: Any questions, Mr. Schiff?

CROSS-EXAMINATION BY MR. SCHIFF:

Q Dr. Adler, are you familiar at all with the [illegible] Medical [end of page]

Colloquy

going on, please explain it to us. We sent it back. Turkey -this is very new in our extradition relationship with Turkey. We were learning a lot about- each other. Turkey is not familiar with us, with the way we use legal language in many respects and how our courts operate either.

Initially, there was a lot of confusion back and forth as to what we were asking for and why we were asking it. Additionally, just by its very nature, extradition is a slow procedure. There's preparing documentation, there's getting translations, there's sending it through the various levels of Bureaucracies. And it was trying to figure out ways to elicit from Turkey the information that we needed. The documents that could be submitted were not always sufficient. There may not have been

identification evidence, which is one of the issues that has to be considered under both the treaty and in an extradition hearing.

So,. this process was a long term, ongoing process. We would have preferred that it went much faster, you know, and I wish it had been able to go much faster. It took us a long time to find, shall we say, a voice to speak to each other so e could start understanding what was going on in each others systems, how these things worked.

We may have been able to technically go forward on some of this material a little earlier, even though we felt here were some deficiencies in it, but we would have [end of page]

admitted that the right answer to the question of whether he had been convicted would never be known until Mr. Sidali was actually returned:

> [Government counsel]: Well, we'll never know until he gets back to Turkey what the right answer--
>
> THE COURT: Wait a minute, what was that?
>
> [Government counsel]: Well, we'll never know until we get back to Turkey. It's a question of what will happen. . . . .

(SA. 43-44). Moreover, the government also conceded before the District Court that there was "nothing tying Mr. Sidali by blood or semen to the crime." (SA. 23).

In a careful opinion, the District Court vacated the certificate of extraditability on two discrete grounds, without reaching any of the other issues raised by Sidali in seeking judicial review: 1) The government's failure to establish that Mr. Sidali had been convicted in Turkey and 2) the absence of probable cause in his case.[16] At the outset, the District Court referred to the Magistrate's repeated requests for State Department review, holding that "one cannot read the record of proceedings before the Magistrate Judge and come away with any conclusion other than that he expected that the

---

[16] Those issues, which are not before this Court, included whether dual criminality had been satisfied, whether the extradition was timely under Turkish and American law, whether the nationality provisions of the treaty barred extradition, whether as a matter of due process limitations on evidence in American proceedings, a foreign conviction entered contrary to principles of double jeopardy could be admitted to establish probable cause, whether due process precluded extradition of someone to face procedures contrary to a federal court's sense of decency, whether the Magistrate erred in denying discovery for DNA testing, as well as the constitutionality of the extradition statute itself and the government's failure to comply with 18 U.S.C. §3188.

Secretary's review would result in the denial of extradition." 914 F.Supp. at 1106[17]

Acknowledging the limited ambit of habeas review, the District Judge first addressed the issue of whether Mr. Sidali had been convicted under Turkish law holding that the Magistrate erred in admitting the unsigned diplomatic note which gave absolutely no indication of the qualifications or even the identity of the person opining of such a critical issue in the case. 914 F.Supp. at 1111. Alternatively, the Court determined that the weight of the note, even if properly considered, would not carry the government's burden given the abundant contradictions from the Turkish documents themselves.

Turning to the General Board decision, the District Court found that the decision, while annulling the acquittal, simply "does not by its terms impose a conviction or make a finding of guilt." 914 F.Supp. at 1111. In that connection, the Court held that the Magistrate's reliance upon Article 325 of the TCCP was unjustified because that provision applied only to judgments reversed in favor of the accused. 914 F.Supp. at 111. As for reliance upon Article 326 of the TCCP, the District Court concluded that this simply represented an exercise in question begging, for the command of that provision to "abide" by decisions of the General Board requires a determination of what the General Board decided. 914 F.Supp. at 1111. From there the District Court conducted an exhaustive review of the diplomatic and other correspondence on whether Mr. Sidali had been convicted and found complete confusion in those exchanges, a confusion that continued even after the government submitted the diplomatic note in an effort to "clarify" what the District Court aptly termed a "morass." 914 F.Supp. at 1111-1112. In light of this careful

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[17] Unfortunately, historical experience suggests the need for considerable skepticism about the State Department's exercise of humanitarian discretion. *See, e.g., In re Normano,* 7 F.Supp. 329 (D. Mass. 1934) (Secretary of State refuses to exercise discretion to prevent return of Jewish fugitive to Third Reich).

consideration the District Court concluded that the government had [end of text]

Appendix Y

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5215

MEHMET SEMIH SIDALI

vs.

IMMIGRATION AND NATURALIZATION SERVICE; THE UNITED STATES OF AMERICA; WARREN CHRISTOPHER, Secretary of State; CHARLES MCNEAL, Acting United States Marshal

Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 95-cv-05665)

Present: Becker, Mansmann and Greenberg, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel December 10, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 1, 1996, be, and the same is hereby reversed and the cause remanded to the said District Court with direction to deny Mr. Sidali's petition for writ of habeas corpus. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: February 24, 1997

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

(2)

No. 97-399

In the Supreme Court of the United States

OCTOBER TERM, 1997

MEHMET SEMIH SIDALI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals erred in declining to vacate its judgment after the case became moot.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to dismiss (Pet. App. 1a) is unpublished. The opinion of the court of appeals reversing the grant of habeas corpus relief from the certification of extraditability (Pet. App. 3a-22a) is reported at 107 F.3d 191. The opinion of the district court granting habeas corpus relief from the certification of extraditability (Pet. App. 44a-66a) is reported at 914 F. Supp. 1104. The opinion of the magistrate judge certifying extraditability (Pet. App. 23a-43a) is reported at 899 F. Supp. 1342.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1997. A petition for rehearing was denied on July 24, 1997. Pet. App. 2a. The petition for a writ of certiorari was filed on September 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A United States magistrate judge in the District of New Jersey certified petitioner's extraditability to Turkey, pursuant to 18 U.S.C. 3184 and the applicable treaty,[1] after finding probable cause to believe that petitioner had committed rape and murder in that country. Pet. App. 23a-43a. The district court granted habeas corpus relief from the certification of extraditability. *Id.* at 44a-66a. The court of appeals reversed the grant of habeas corpus relief. *Id.* at 3a-22a. While a petition for rehearing was pending, the Turkish criminal proceedings against petitioner were dismissed, and the magistrate judge granted the government's motion to dismiss the extradition complaint. *Id.* at 68a; see *id.* at 73a-74a. The court of appeals denied petitioner's motion to dismiss the appeal as moot. *Id.* at 1a.

1. In 1971, petitioner was charged in Turkey with the rape and murder of a 15-year-old girl who had been living at his house in Mersin, Turkey. He was acquitted by the three-judge trial court, but the appellate

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[1] Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891, 1981 WL 178195.

court reversed the acquittal.[2] After a retrial, petitioner was again acquitted, but the appellate court again reversed, citing "sufficient and convincing evidence" of petitioner's guilt. Pet. App. 5a-8a.

On December 17, 1976, four days after the appellate court's decision, petitioner applied for a passport. Mistakenly believing that petitioner had been acquitted, the Turkish government permitted him to leave the country. Petitioner has lived in the United States since January 1977. Pet. App. 8a.

The Turkish government issued an absentia arrest warrant for petitioner in March 1977. Pet. App. 28a.

2. On October 31, 1994, the United States filed an extradition complaint, on behalf of Turkey, charging petitioner with rape and murder, which are extraditable offenses under the extradition treaty between the two countries. Pet. App. 9a. A magistrate judge conducted a hearing to ascertain whether there was "evidence sufficient to sustain the charge[s]," 18 U.S.C. 3184, and thus whether petitioner was subject to extradition. Pet. App. 9a. The magistrate judge found that the Section 3184 standard was satisfied on two independent grounds: first, because petitioner had already been convicted of rape and murder by the Turkish appellate court, and, second, because the United States had established probable cause, aside from the conviction, to believe that petitioner had committed the crimes. *Id.* at 10a, 33a-34a, 41a.[3] The

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[2] Under Turkish law, "verdicts of acquittal may be appealed to the Supreme Court of Appeals." Pet. App. 6a.

[3] The magistrate judge noted that the government had shown, among other things, "that the victim lived in [petitioner's] home; that she was raped and strangled; that [petitioner] had the opportunity to commit the crime; that [petitioner] was the only man living in the home at the time;

magistrate judge therefore entered an order of extradition. *Id.* at 10a, 41a.

Petitioner challenged the extradition order by seeking a writ of habeas corpus. Pet. App. 11a. The district court granted habeas corpus relief. *Id.* at 12a, 44a-66a. The court held that the government had failed to establish either that petitioner was actually convicted of rape and murder or that there was probable cause to believe that he had committed those crimes. *Id.* at 12a, 57a-65a.

The court of appeals reversed. Pet. App. 3a-22a. First, the court held that petitioner's Turkish conviction was "*per se* probable cause" to warrant his extradition. *Id.* at 18a. The court rejected petitioner's argument that the Turkish appellate court had merely remanded the case for a third trial on the issue of guilt; instead, the court concluded that the appellate court, consistent with Turkish law, had remanded the case only for the imposition of sentence. *Id.* at 14a-18a. Second, the court held that the magistrate judge's alternative finding—that probable cause existed, aside from the conviction, to believe that petitioner committed rape and murder—was adequately supported by competent evidence in the record. *Id.* at 18a-21a. The court therefore concluded that petitioner "may be extradited" to Turkey. *Id.* at 4a.

3. On April 10, 1997, six weeks after the Third Circuit entered its judgment, a Turkish court "decided to abolish the case against [petitioner] because the statute of limitations has expired." Pet. App. 74a.

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that there was no conclusive proof that anyone else had entered the house; and that blood was discovered on [petitioner's] pajama sleeve shortly after the crime." Pet. App. 34a.

The court's order indicates that petitioner was represented by counsel in that proceeding. See *id.* at 88a-90a. On that same day, petitioner filed a petition for rehearing in the court of appeals. *Id.* at 76a. He subsequently filed a motion to dismiss the appeal as moot.

On May 6, 1997, while petitioner's motion and petition for rehearing were pending in the court of appeals, the Turkish government notified the State Department by diplomatic note that it was "withdrawing its request for the extradition of [petitioner]." Pet. App. 74a. On May 8, 1997, the United States moved to dismiss the extradition complaint against petitioner. *Id.* at 73a. The complaint was dismissed the following day. *Id.* at 68a.

The United States opposed petitioner's motion to dismiss the appeal. Pet. App. 75a-82a. The government acknowledged that the extradition case was moot in light of Turkey's withdrawal of its request for extradition. *Id.* at 80a.[4] Relying on this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), however, the government argued that "the public interest would [not] be served by a vacatur" of the court of appeals' decision. Pet. App. 81a. The government noted that "[i]t appears" that petitioner's extradition case did not become moot by "happenstance," but because petitioner "affirmatively sought the [Turkish court's] ruling." *Id.* at 77a (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). The government

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[4] Prior to Turkey's request for dismissal of the extradition complaint, the government argued that petitioner's extradition case was not moot, because further appellate review of the decision was possible in Turkey. Pet. App. 76a.

also contended that petitioner was responsible for delaying the court of appeals' decision by twice moving for extensions of time in which to file his brief. *Id.* at 77a n.3. Thus, the government argued, petitioner was not entitled to dismissal or vacatur of the court of appeals' opinion. See *id.* at 77a, 84a-86a.

In response, petitioner asserted that his extradition case became moot by happenstance, but did not dispute that he had sought the Turkish court's ruling. He claimed that it was merely "the passage of time" that led to the dismissal of the Turkish prosecution on statute of limitations grounds, and that he was not responsible for delaying proceedings in the Third Circuit. Reply Mem. 5.[5] The court of appeals denied petitioner's motion to dismiss in an unpublished order (Pet. App. 1a), and subsequently denied his petitions for rehearing (*id.* at 2a, 67a).

ARGUMENT

Petitioner contends (Pet. 12-16) that the court of appeals erred in denying his motion to vacate the judgment when the case became moot while his petition for rehearing was pending. But no decision of this Court requires vacatur in such circumstances. Nor does the court of appeals' unpublished order give rise to a ripe circuit conflict or otherwise warrant

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[5] In its Opposition to Appellee's Motion to Stay Mandate Pending Rehearing En Banc or Certiorari Petition, filed after petitioner's Reply Memorandum, the government again stated that "the event that * * * mooted [petitioner's] case did not result from happenstance but occurred because of his own litigative efforts in Turkey." Pet. App. 86a. Petitioner has not disputed in his petition for a writ of certiorari that he affirmatively sought the dismissal of the case in Turkey. See Pet. 10-11, 13.

review. And, in any event, this case would not be a suitable vehicle, given its unusual facts and circumstances, to consider any rules of general application regarding vacatur.

1. Petitioner argues (Pet. 12) that *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), required vacatur of the court of appeals' judgment. But *Munsingwear* does not govern this case. In *Munsingwear*, the Court stated that its "established practice" in a federal civil case that has become moot "on its way here or pending our decision on the merits" was "to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. But this case did not become moot "on its way" to the Third Circuit. Nor did it become moot "pending [the Third Circuit's] decision on the merits." It became moot only after the Third Circuit issued its decision. This Court has declined to vacate its own decisions in analogous circumstances. See, *e.g.*, *Robinson* v. *California*, 371 U.S. 905 (1962) (denying request to vacate decision after being informed on petition for rehearing that appellant died before decision was issued).[6]

This Court has made clear since *Munsingwear*, moreover, that vacatur is not automatic, even when a case becomes moot before a decision on the merits. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) (declining to vacate court of appeals' judgment when case was mooted by settlement after petition for certiorari was granted).

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[6] Cf. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 355 (1997 Supp.) (suggesting that "[t]he most persuasive setting for refusing to vacate a judicial opinion according to the terms of a settlement" is when the settlement occurs "after decision by the court of appeals" rather than when appeal is pending).

The Court noted in *U.S. Bancorp* that "[t]he principal condition to which we have looked" to decide whether to vacate "is whether the party seeking relief from the judgment below caused the mootness by voluntary action," in which case vacatur is ordinarily inappropriate. *Id.* at 24. By contrast, where mootness arises from "happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties" —there may be "sufficient reason to vacate." *Id.* at 23, 25 n.3 (internal quotation marks omitted). It appears that this case became moot not because of mere happenstance, but because of petitioner's own successful challenge to the criminal proceedings against him in Turkey. See Pet. App. 77a & n.3, 86a. The case therefore differs from the situation discussed in *Munsingwear* and *U.S. Bancorp* on that ground as well.[7]

2. Petitioner claims (Pet 12-13) that there is a conflict among the courts of appeals over whether vacatur should be ordered when a case becomes moot between the issuance of the decision and the mandate.

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[7] Petitioner asserts (Pet. 11, 15-16) that the INS has taken the position that the Third Circuit's decision bars his naturalization. The letter that he cites, however, said no such thing. See Pet. App. 122a-123a. Rather, the letter simply stated that the INS had recently learned of the Third Circuit's decision, which determined that petitioner had been convicted of rape and murder in Turkey. *Id.* at 122a. The letter said nothing about subsequent events, including the dismissal of those charges against petitioner, and invited petitioner to offer evidence in support of his naturalization application and in opposition to the denial. *Id.* at 123a. The letter thus did not give the Third Circuit's decision preclusive effect. Nor did the letter suggest that vacatur of that decision would affect the INS's administrative determination.

But the conflicting cases on which petitioner relies predate *U.S. Bancorp*, and appear to rest, at least in part, on a broader reading of *Munsingwear* than may be warranted after *U.S. Bancorp*. See *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983); *Clarke* v. *United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc); *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992) (citing *Clarke*). There is no need for this Court to consider the supposed conflict asserted by petitioner until those circuits have had an opportunity to revisit the issue in light of *U.S. Bancorp*. See *Mahoney* v. *Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) (suggesting that aspects of *Clarke* "may no longer be good law" after *U.S. Bancorp*). And, in any event, because the court of appeals denied vacatur in this case in an unpublished order without opinion, its action does not give rise to a concrete conflict with the pre-*U.S. Bancorp* decisions.

3. Finally, this case would not be a suitable vehicle to refine the rules governing vacatur, even if any further refinement is warranted so soon after *U.S. Bancorp*. The case arises in unusual circumstances that are unlikely to recur. Petitioner does not cite any other decision involving mootness resulting from similar events. It thus does not appear likely that this case would require the Court to articulate any rules of general application regarding vacatur.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997

Supreme Court, U.S.
FILED
JAN 7 1998
CLERK

(3)

No. 97-399

In The

Supreme Court of the United States

October Term, 1997

MEHMET SEMIH SIDALI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Even though this case became moot through the passage of time, the Opposition nevertheless contends that mootness did not occur by happenstance because the Turkish trial court dismissed the charges against Mr. Sidali on his motion. Opp. Br. 8. This argument misses the mark as a matter of law, for under Article 117 of the Turkish Criminal Code ("TCC"), "The periods fixed by statutes of limitation for public prosecution *shall be applied by the court on its own motion.* Neither the accused nor the convict can waive this right." (App., *infra,* 151a-162a)[1] (emphasis supplied). In line with this provision, the Turkish trial court applied the statute of limitations *sua sponte* to dismiss the case against Mr. Sidali as time barred. (App., *infra,* 88a-90a). Indeed, that court's decision makes no reference to any motion by Mr. Sidali and, instead, consistent with TCC Art. 117, states, "[n]ow it has been observed that the statute of limitations has expired. Therefore, the court decided to dismiss the case on that basis and issued the following decision." (App., *infra,* 89a). Accordingly, as a matter of law, the dismissal of charges against Mr. Sidali resulted not from any action on his part but from the trial court's own application of the statute of limitations, as mandated by TCC Art. 117, given the passage of time. Furthermore, the government's attempt to impugn this legal conclusion by repeated references to Mr. Sidali's allegedly not having denied the government's contention that he sought such a ruling has no merit. Opp. Br. 6. Under TCC Art. 117, the trial court

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[1] Pagination of the appendix is continued consecutively from the appendix in the original petition for a writ of certiorari.

was required to apply the statute of limitations and the record is clear that this was done *sua sponte* and not on motion from Mr. Sidali.

2. More fundamentally, however, the government's argument on happenstance fails to acknowledge that the underlying cause of mootness was the passage of time, an elemental fact beyond Mr. Sidali's control. Indeed, the passage of time causing mootness stands in marked contrast to the kind of voluntary action that this Court has recognized would have an effect upon vacatur such as the resignation from employment in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) or the settlement in *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18 (1994). Nor, for that matter, was there acquiescence in the Third Circuit's decision on the merits. *Compare* 15 Coquillette *et al. Moore's Federal Practice* § 101.97 at 101-83 (1997). In short, there was no "voluntary forfeiture of review." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 26.

Furthermore, the Opposition seems to confuse the nature of the cause with the recognition of the effect. Yet to recognize that a case has become moot through the passage of time does not render the passage of time any less happenstance than filing a suggestion of death on the record would prevent death from being a cause of mootness by happenstance. If anything, the government's evident confusion on this point serves to underscore the need for clarification in applying the concept of mootness by happenstance. Moreover, the Opposition underscores the appropriateness of certiorari by highlighting the apparent tension between the denial of vacatur below and *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*), which vacated a court of appeals opinion holding the

defendant had a right to pretrial bail because the defendant's subsequent conviction mooted the issue of pretrial release, just as the trial court's decision dismissing the charges against Mr. Sidali mooted the issue of his extraditability.

In this connection, moreover, operating within the government's framework would make the government, which prevailed on the merits before the Third Circuit, the party causing mootness since the government urged that the case did not become moot until the government itself dismissed the extradition complaint. Furthermore, the government waited until October 1994 to commence this extradition even though extradition was first requested in February 1982 and in May 1993 the running of the statute of limitations by the end of March 1997 was expressly acknowledged. (App., *infra*, 53a, 64a-65a, 99a-101a).[2] Similarly, the government took the entire 60 days to file a notice of appeal in this case, did not move for expedited appeal, consented to Mr. Sidali's modest requests for an extension to file his brief, and did not move for immediate issuance of the mandate after the Third Circuit's February 24, 1997 opinion.

3. While recognizing the existence of conflicting cases, the Opposition seems to argue that vacatur following mootness by happenstance is not required in light of *U.S. Bancorp*. Opposition Br. 9. Yet this would hardly seem consistent with the teaching of *Arizonans for Official English*, 117 S.Ct. at 1071 that "[v]acatur is in order when

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[2] This delay was characterized by the District Court as one of "Rip Van Winkle-like proportions." (App., *infra*, 47a).

mootness occurs through happenstance. . . . " Moreover, after *U.S. Bancorp.*, the government itself had no difficulty in urging that "[w]here an appeal becomes moot after the court has issued its opinion but before the losing party can seek rehearing[3] and before the mandate has issued, the appropriate disposition is to vacate the panel's disposition and dismiss the appeal." Motion To Vacate Decision As Moot And Dismiss Appeal, *Humphreys v. Drug Enforcement Administration*, 105 F.3d 112 (3rd Cir. 1996) at 2. (App., *infra*, 154a).

The government also seeks to minimize the obvious conflict among the circuits by arguing that the conflicting cases antedate *U.S. Bancorp.* and may be limited by that decision. Opp. Br. 9. Yet such a claimed limitation was not recognized in the government's own motion to vacate the original *Humphreys* opinion, filed some two years after *U.S. Bancorp.*, while the Third Circuit, in denying the motion, openly acknowledged a conflict with sister circuits. 105 F.3d 116-117. (App., *infra*, 154a). Furthermore, in following close on the heels of *Humphreys*, which the government strongly urged below to deny vacatur, the panel's decision over the dissent by Judge Becker extends a clear conflict among the circuits that *Humphreys* itself had expressly noted. (App., *infra*, 77a, 80a, 84a).

Finally, the panel's decision in *Mahoney v. Babbitt*, 113 F.3d 219 (D.C. Cir. 1997) cited by the Opposition hardly reduces the conflict among the circuits evinced by *Clarke*

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[3] In Mr. Sidali's case the government urged that the dismissal of the extradition complaint and the charges in Turkey mooted out his petition for rehearing before the Third Circuit. (App., *infra*, 80a).

v. United States, 915 F.2d 699, 706 (D.C. Cir. 1990) (*en banc*). In both *Mahoney* and *Clarke* the government had sought vacatur of an adverse decision by the court of appeals, and *Mahoney* took care to distinguish *Clarke* on the grounds that the government in that case, like Mr. Sidali here but unlike the government in *Mahoney*, had not complied with the appellate decision sought to be vacated but, instead, had petitioned for rehearing. While *Mahoney* recognized that *U.S. Bancorp* may have limited *Clarke*, this was on an issue not relevant here, namely that the effect of precedential significance in a decision to vacate. *See also National Black Police Association v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997) relying upon *Clarke* after *U.S. Bancorp* to grant vacatur to government when legislation mooted the case.

If anything, moreover, the Opposition adds to the need for resolution of this conflict by reliance upon *Robinson v. California*, 371 U.S. 905 (1962) (*per curiam*), from which three members of the Court including Justice Harlan dissented, for there is certainly reason to believe that *Robinson* might well not be good law in light of *Arizonans for Official English*, since the mooting fact in *Robinson*, namely the death of the appealing party, occurred 10 days before filing of the appellant's jurisdictional statement but was not disclosed until after this Court's decision had been handed down. *Compare Arizonans for Official English*, 117 S.Ct. at 1069 ("facts that raise a question of mootness" must be brought to Court's attention promptly, with vacatur ordered for appellate decision issued after undisclosed mooting event). Indeed, *Humphreys*, 105 F.3d at

114, which was handed down before *Arizonans for Official English*, expressly relied upon *Robinson*. Furthermore, *Robinson* would appear to conflict not only with *Arizonans for Official English* but would seem to exist in tension with recent decisions of this Court where vacatur was granted when a case had become moot while a petition for certiorari was pending. Indeed, in those cases, just as in *Robinson*, no further review could be had at that point. *See, e.g., Joint School District 24 v. Harris*, 115 S.Ct. 2604 (1995) (in school prayer at graduation case, graduation occurs during pendency of certiorari petition and opinion below vacated by this Court); *Alabama v. Davis*, 446 U.S. 903 (1980) (opinion below vacated when case becomes moot during pendency of certiorari petition).

4. With respect to the legal harm that the denial of vacatur has imposed upon Mr. Sidali, the INS certainly does appear to have accorded preclusive effect to the decision by the Third Circuit and has not granted Mr. Sidali's naturalization application, while the government does not renounce any such preclusive effect as legally unwarranted. Furthermore, the government does not even abjure preclusive use of the Third Circuit's decision to seek Mr. Sidali's deportation as an aggravated felon in light of the panel's holding that he had been convicted. 8 U.S.C. § 1227(a)(2)(A)(iii) (West Supp. 1997). Moreover, given the government's present position that those whose deportation is sought on such criminal grounds under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1672 cannot obtain judicial review even of the administrative determination that they are deportable as criminal aliens in the first place, Mr. Sidali runs the very real risk that any

challenge he might have to the preclusive effect of the Third Circuit's decision will never be heard by any court. *Compare Berehe v. INS*, 114 F.3d 159, 160 (10th Cir. 1997) (no judicial review of INS determination that alien deportable on criminal grounds barring judicial review) with *Yang v. INS*, 109 F.3d 1185 (7th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3414 (Dec. 15, 1997) (limited judicial review of whether alien deportable on criminal grounds barring judicial review). In short, this case presents a prime example where vacatur should be employed to clear the path for future relitigation given the harm facing Mr. Sidali. *Arizonans for Official English*, 117 S.Ct. at 1071. By contrast, the government has adduced no valid much less compelling reason for retaining the decision below, which the government itself characterized as "not otherwise remarkable or groundbreaking," though restating venerable precedent in the Third Circuit. (App., *infra*, 76a).

5. Finally, the Opposition fails to recognize that this case presents an issue that has already divided the circuits, namely whether a circuit opinion should be vacated when the case becomes moot after issuance of the opinion but before expiration of the time for seeking certiorari. In other words, this issue has occurred in at least four different circuits, the Eleventh, Ninth, District of Columbia, and Third, with the last circuit departing sharply from the prior three. Moreover, the magnitude and likely recurrence of this conflict is enhanced by the fact that *Humphreys* also conflicts with the government's own litigating position on this issue, as the government's motion to vacate in *Humphreys* confirms, while this litigating position has not changed since *U.S. Bancorp*. Given this intercircuit conflict, the government's contention that the

conflict is unlikely to recur in the exact same form as presented here is simply irrelevant, though, to be sure, one of those conflicting cases does arise from an extradition proceeding. *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983). Furthermore, the fact that a mooting event may stem from developments outside the litigation has certainly been a recurrent theme and, for example, was present in *United States v. Munsingwear*, 340 U.S. 36 (1950) itself, where the mooting event on litigation involving government regulations was the repeal of those regulations. Similarly in *Murphy*, 455 U.S. at 481, the mooting event on a civil rights action for pretrial release was the defendant's conviction in criminal proceedings.

In other words, some three years after *U.S. Bancorp.* an acknowledged conflict exists among the circuits and should be resolved. *See, e.g., Bryan v. United States*, 122 F.3d 190 (2d Cir. 1997), *cert. granted*, 60 U.S.L.W. 3411 (Dec. 15, 1997) (certiorari granted to resolve conflict among the circuits over knowledge requirement in prosecution under 18 U.S.C. § 922). Moreover the Opposition has highlighted the tension between the divergent Third Circuit precedent and *Murphy* as well as the possible conflict between *Robinson* and *Arizonans for Official English*, both of which factors underscore the appropriateness of certiorari. Indeed, this petition presents perhaps the first case to come before this Court since *U.S. Bancorp* where the mooting event was neither settlement, voluntary action of the prevailing party, nor compliance with the judgment sought to be vacated. Finally, given the extent to which the refusal to vacate below conflicts with the command of *Arizonans for Official English*, 117

S.Ct. at 1071, handed down after *Humphreys*, the Court may wish to consider summary reversal.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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APPENDIX Z

The American Series
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TURKEY

Dismissal of Actions

* * *

running of the statute of limitations. Also, seizure of the convict for execution of the sentence regarding punishments restricting personal liberty interrupts the running of the statute of limitations.

If a person is convicted of an offense, and commits another offense of the same kind, while the statute of limitations was running, then the statute of limitations shall be interrupted.

115. Where the punishments of temporary disqualification to hold public office or disqualification to perform a profession or trade or any other punishment of disqualification are added to other punishments, or are incident to a conviction, such additional or incident punishments shall not be set aside, unless a period equal to twice the period of such additional punishments has elapsed and the statute of limitations starts to run on the date the principal punishment is set aside.

116. The periods fixed by statutes of limitation both for public prosecutions and for execution of sentences shall be computed in accordance with the provisions of Article 30.

117. The statute of limitations both for public prosecutions and for execution of sentences shall be applied by the court on its own motion. Neither the accused nor the convict can waive this right.

118. Felonies punishable by death, heavy life imprisonment or temporary life imprisonment, prescribed in Part 1 of Book Two of this code, if committed outside Turkey, shall not be subject to the statute of limitations.

119. Where the contrary is not specified by law, the public prosecution shall be dismissed, if the perpetrator of a misdemeanor punishable by a light fine of not more than 50 liras deposits in the concerned office, before the hearing, the maximum amount of the fine prescribed for the misdemeanor and the court expenses.

120. Setting aside of punishments imposed by a sentence will not dismiss the provisions of the sentence respecting private rights, recovery of property, payment of compensation and court expenses. However, dismissal resulting from amnesty shall dismiss even the Treasury claim for collection of court fees.

* * *

APPENDIX AA

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EARL A. HUMPHREYS, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-3099
	)	
DRUG ENFORCEMENT ADMINISTRATION,	)	
	)	
	)	
Respondent.	)	

MOTION TO VACATE DECISION AS MOOT AND DISMISS APPEAL

Respondent, Drug Enforcement Administration, by and through the undersigned attorney, respectfully moves this Court pursuant to Third Circuit Local Appellate Rule 27.4 to vacate its decision in this case as moot. As grounds for this motion, respondent states as follows:

1. This is an appeal of the Drug Enforcement Deputy Administrator's final order revoking petitioner's Certificate of Registration to prescribe controlled substances pursuant to 21 U.S.C. 824(a)(4). On September 17, 1996, this Court filed its decision vacating the Deputy Administrator's order and remanding the case to the agency. The government has until November 1, 1996, to file its petition for rehearing. Fed. R. App. Proc. 40.

2. Petitioner Earl A. Humphreys, M.D., passed away on Wednesday, September 25, 1996. See attached exhibit. Pursuant to 21 C.F.R. 1301.62, his Certificate of Registration terminated at his death. Accordingly, there is no "present controversy as to which effective relief can be

granted" and the appeal has become moot. See *Independent Union of Flight Attendants (IUFA)* v. *Pan American*, 966 F.2d 457, 459 (9th Cir. 1992).

3. Article III of the Constitution limits the jurisdiction of the federal courts to actual, ongoing cases or controversies. U.S. Const. art III, § 2; *Ivy Club* v. *Edwards*, 943 F.2d 270, 275 (3d Cir. 1991), cert. denied, 112 S. Ct. 1282 (1992); *In re Taylor*, 916 F.2d 1027, 1028 (5th Cir. 1990); *N.J. Turnpike Authority* v. *Jersey Central Power*, 772 F.2d 25, 30 N.10 (3d Cir. 1985). "This case-or-controversy requirement subsists through all stages of the judicial proceedings, trial and appellate." *Ivy Club*, 943 F.2d at 275.

4. Where an appeal becomes moot after the court has issued its opinion but before the losing party can seek rehearing and before the mandate has issued, the appropriate disposition is to vacate the panel's disposition and dismiss the appeal. See, *e.g.*, *Stewart* v. *Southern Ry. Co.*, 315 U.S. 784, vacating as moot, 315 U.S. 283 (1943); *Key Enterprises of Delaware, Inc.* v. *Venice Hospital*, 9 F.3d 893, 899 (11th Cir. 1993), cert. denied, 114 S. Ct. 2132 (1994); *IUFA* v. *Pan American*, 966 F.2d at 459; *In re United States*, 927 F.2d 626, 627 (D.C.Cir. 1991); *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983).

Accordingly, since this Court now lacks jurisdiction over the issue presented by this case, respondent requests that the Court vacate the panel's decision and dismiss the appeal.

In addition, respondent requests that the schedule for filing a petition for rehearing of the decision be stayed pending the Court's disposition of this motion.

Respectfully submitted,

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